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86-181

No._____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

PATRICIA A. DIXON,
Petitioner,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
Respondent.

PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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18 pp

QUESTION PRESENTED FOR REVIEW

Is a Title VII charge "initially instituted" with a State Agency, thereby triggering Section 706(e)'s 300-day extended charge filing period, where pursuant to a Work Sharing Agreement with Equal Employment Opportunity Commission, the State Agency allocates to the Commission its initial processing of the charge under Section 706(c). Whether the Fourth Circuit's opinion is in conflict with Love vs. Pullman, 404 U.S. 522 (19781) and Mohasco Corp. vs. Silver, 447 U.S. 807 (1980).

TABLES

1) TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW .....(i)

TABLES
Table of Contents .....(ii)
Table of Authorities:
Cases .....(iv)
Statutes, Rules and Regulations ...(vi)

PARTIES TO THE PROCEEDINGS 1

REFERENCE TO THE OFFICIAL REPORTS BELOW 2

JURISDICTION 3

STATUTES AND REGULATIONS IN THE PRESENT ACTION 3

CONCISE STATEMENT OF THE CASE 7

ARGUMENTS OUTLINING THE REASONS RELIED UPON FOR THE ALLOWANCE FOR THE WRIT 15

CONCLUSION 36

CERTIFICATE OF SERVICE 38

APPENDICES
I. Dixon vs. Westinghouse Electric Corporation
787 F.2d 943 (1986) 39

II. 1985-1986 Worksharing Agreement Between The Equal Employment Opportunity Commission, Baltimore District Office, And The Maryland Commission On Human Relations 50

III. C.F.R. Section 1601.13 62

TABLE OF AUTHORITIES

Cases

Ciccone vs. Textron, Inc.
449 U.S. 914 (1980) 17,25

City Corp Person-to-Person Financial Corp. vs. Brazell
658 F.2d 232 (4th Cir. 1981) 17,25 26

Doski vs. M. Goldseker Co.
539 F.2d 1326 (4th Cir. 1976).. 34

EEOC vs. Shammrock Optical Co.
788 F.2D 491 (8th Cir. 1986)... 31

Ewald vs. Great Atlantic & Pacific Tea Co., Inc.
449 U.S. 914 (1980)..... 17,25

Howze vs. Jones and Laughlin Steel Corp.
750 F.2d 1208 (3rd Cir. 1984)...25

Isaac vs. Harvard University
769 F.2d 817 (1st Cir. 1985).16,23 27,32

Jones vs. Birco Carbide Chemical Co.
691 F.2d 1200 (6th Cir 1982)....25

Love vs. Pullman
404 U.S. 522 (1971).....15,18 31,35

Mohasco Corp vs. Silver
447 U.S. 807 (1980).....15,18 20,30,31

New York Gaslight Club, Inc. vs. Carey
447 U.S. 54 (1980).....33

Oscar Mayer & Co. vs. Evans
441 U.S. 750 (1978).....15,18
22,33

Owens vs. Ramsey Corp.
656 F.2d 340 (8th Cir. 1981)....25

Rasimis vs. Michigan Department of
Mental Health
714 F.2d 614 (8th Cir. 1983)....25

Saulsbury vs. Wismer and Becker, Inc.
644 F.2d 1251 (9th Cir. 1980)...23

Smith vs. Oral Roberts Evangelical
Association, Inc.
731 F.2d 684 (10th Cir. 1984)...23

Other Authorities

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000(e) et seq.

Section 705(g)(1) 10

Section 706(b) 20

Section 706(c) 9,10 18,29

Section 706(e) 9,15 27,29,30

Section 709(b) 10

29 C.F.R. Section 1601.13 11

1985-86 Work Sharing Agreement between The Equal Employment Opportunity Commission, Baltimore District Office, and the Maryland Commission On Human Relations 10

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PARTIES TO THE PROCEEDING

At the commencement of this action, Ms. Dixon was Plaintiff, Westinghouse Electric Corp. was Defendant. At the Appellate level Equal Employment Opportunity

Commission (hereinafter referred to as The EEOC) participated in this action by filping an Amicus Curiae brief. After the decision was rendered by the Fourth Circuit Court of Appeals, The EEOC filed a Motion for Intervention, and lodged a Petition for Rehearing and Suggestion for Rehearing En Banc. The Fourth Circuit has not yet ruled on these motions.

REFERENCE TO THE OFFICIAL REPORTS BELOW

The Honorable Judge Young filed his Memorandum and Order August 19, 1985. The opinion is found at 40 FEP Cases 793 (1985). The opinion of the Court of Appeals, rendered on April 10, 1986, is found at 787 F.2d 943 (1986).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND REGULATION INVOLVED IN THE PRESENT ACTION

1. Section 705(g)(1) of Title VII, 42 U.S.C. 2000(e)-4(g)(1):

> The Commission shall have power--
> (1) to cooperate with and, with their consent, utilize regional state, local, and other agencies, both public and private, and individuals:

2. Section 706(c) of Title VII, 42 U.S.C. 2000(e)-5(c):

> (c) In the case of an alleged unlawful employment practice occurring in a state, or political subdivision of a state, which

has a state or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a state or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (a) by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the state or local law, unless such proceedings have been earlier terminated, provided that such sixty-day period shall be extended to one hundred and twenty days during the first year after the effective date of such State or local law. If any requirement for the commencement of such proceedings is imposed by a state or local authority other than a requirement of the filing of a written and signed statement of the facts upon which the proceeding is based, the proceeding shall be deemed to have been commenced for the purposes of this subsection at the time such statement is sent by registered mail to the appropriate state or local authority.

3. Section 706(e) of Title VII, 42 U.S.C. Section 2000(e)-5(e):

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and cicumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a State of local agency with authority to grant or seek relief from such practice or to institute criminal proccedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the state or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the

Commission with the state or local agency.

4. Section 709(b) of Title VII, 42 U.S.C. 2000(e)-8(b):

> (b) The Commission may cooperate with state and local agencies charged with the administration of state fair employment practices laws and, with the consent of such agencies, may, for the purpose of carrying out its functions and duties under this title and within the limitation of funds appropriated specifically for such purpose, engage in and contribute to the cost of research and other projects of mutual interest undertaken by such agencies, and utilize the sevices of such agencies and their employees, and,notwithstanding any other provision of law, pay by advance or reimbursement such agencies and their employees for services rendered to assist the Commission in carrying out this title. In furtherance of such cooperative efforts, the Commission may enter into written agreements with such state or local agencies and such agreements may include provisions under which the Commission shall refrain

> from processing a charge in any cases or class of cases specified in such agreements or under which the Commis sion shall relieve any person or class of persons in such state or locality from requirements imposed under this section. The Commission shall rescind any such agreement whenever it determines that the agreement no longer serves the interest of effective enforcement of this title.

5. 29 C.F.R. Section 1601.13, see Appendix.

6. 1985-1986 Work Sharing Agreement between The EEOC, Baltimore District Office, and the Maryland Commission on Human Relations (herein referred to as The MCHR), see Appendix.

CONCISE STATEMENT OF THE CASE

This is a Title VII-Sex Discrimination case whose facts have created a con-

troversy striking at the heart of the administration of the Title. The Title is administered through a complex set of statutes, regulations and, in some states, agreements between states and The EEOC, called Work Sharing Agreements. The Work Sharing Agreement, as a tool of implementation of Title VII, does not act to bar Petitioner's claim.

Congress recognized that there were state agencies administering state laws and fair employment practices similar to Title VII. In an effort to accord state agencies with fair employment practices (fair employment practice agencies or FEP agencies) a role in the processing of the discrimination claims and to ease the burden on the EEOC of having to investigate each and every charge where federal efforts would be duplicative of state proceedings, the EEOC enacted regulations de-

signating certain agencies as authorized FEP agencies pursuant to Section 706. Maryland is a state with fair employment practice laws. The MCHR under EEOC regulations is a Section 706 FEP agency.

Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000(e) et seq., charges of employment discrimination must be filed with The EEOC within 180 days of the alleged discriminatory act unless the complainant has "initially instituted proceedings" with his/her state or local FEP agency, in which case the federal filing period is extended to 300 days. Section 706(e), 42 U.S.C. 2000(e)-5(e). Section 706(c) of Title VII, 42 U.S.C. 2000(e)-5(c), provides that, "once proceedings have been commenced under the State or local law," a charge cannot be filed with The EEOC until 60 days after those proceedings begin or are earlier

terminated.

In light of this federal-state scheme of resolving employment discrimination complaints, Congress authorized The EEOC to cooperate with FEP agencies [Section 705(g)(1), 4 U.S.C. 2000(e)-4(g)(1)], specifically by entering into written agreements with them in the interest of "effective enforcement of this title." Section 709(b), 42-U.S.C. 2000(e)-8(b). In that regard, The EEOC entered into approximately eighty "Work Sharing Agreements" with state and local FEP agencies nationwide to allocate the work to be shared pursuant to the federal-state scheme. Therefore, these agreements typically state that the State agency will initially process certain categories of Charges and that The EEOC will initially process others, with the State waiving its Section 706(c) right to the sixty day pro-

cessing in the latter instance. See 29 C.F.R. 1601.13(c).

The Charge in this case was processed under a 1981 Work Sharing Agreement under which The EEOC assumed, inter alia, primary responsibility for processing all charges "originally received by The EEOC" as well as "all other charges covered under Title VII which are received by The EEOC between 180 and 300 days after the alleged violation." (p. 57) "In order to facilitate the resolution of charges ... (MCHR) waived its exclusive right to specific periods of initial processing." (p. 58). With respect to the specific charge, The MCHR could exercise its right to process a charge by "express(ing) an interest in pursuing a charge for which it does not have primary responsibility." (p. 59).

Patricia Dixon was employed by

Westinghouse in its Engineering Drafting Department from 1971 until discharged on December 18, 1981. Ms. Dixon alleges that she was discharged because of sex discrimination. Westinghouse contends that the reason for her discharge was because of excessive absenteeism.

On August 4, 1982, 230 days after her discharge, Ms. Dixon filed a Charge of Discrimination with The EEOC. On that day, in accordance with its Work Sharing Agreement, The EEOC sent a copy of Ms. Dixon's Charge to The MCHR accompanied by The EEOC's Transmittal Form 2128. Upon receipt, The MCHR assigned its own number to the Charge and on August 11, 236 days after the discharge, returned Form 2128 to The EEOC indicating thereon that it would not process Dixon's Charge. The MCHR informed Dixon that they had terminated its proceedings because The EEOC could better

process her Charge. The EEOC terminated its processing of Ms. Dixon's Charge in June of 1983 and issued her a Notice of Right to Sue.

Subsequent to the termination of the proceedings before The EEOC and The MCHR , and as a result of the issuance of the Right to Sue Letter, Ms. Dixon filed a Title VII suit. The jurisdiction of the District Court was invoked pursuant to 92 U.S.C., Section 2000(e)-5(f) (1977) and 28 U.S.C., Section 2201 and 2202(1976).

On August 20, 1985, the Honorable Judge Young dismissed Dixon's Claim as being untimely filed. The Court held that Dixon was not entitled to the extended 300-day federal filing period applicable in deferral states because she had not "initially instituted" proceedings with The MCHR, and that her suit was untimely because her Charge was not filed within

the 180 days limitations period applicable in non-deferral states.

The Fourth Circuit Court of Appeals affirmed. It agreed with the District Court that Dixon had not "initially instituted" proceedings with the state agency, on the ground that The EEOC's transmission of the charge to the state was insufficient to constitute institution of state proceedings because the state had waived processing of the charge under the Work Sharing Agreement and, consequently, it "was never contemplated that MCHR would play a substantive role in processing the charge." (p. 51).

ARGUMENTS OUTLINING THE REASONS RELIED UPON FOR THE ALLOWANCE FOR THE WRIT

Appellant strongly urges that a Writ of Certiorari should be granted in this case because:

Argument 1.: The Fourth Circuit's holding that state proceedings were not "initially instituted" within the meaning of Section 706(e), 42 U.S.C. 2000(e)-5(e), conflicts with the decisions of the Supreme Court in Love vs. Pullman, 404 U.S. 522 (1971) and Mohasco Corp. vs. Silver, 447 U.S. 807 (1980), both of which held that The EEOC may institute state proceedings by notifying a state agency of a charge and Oscar Mayer & Co vs. Evans, 441 U.S. 750 (1978), which held that "commencement" of state proceedings may not be conditioned on anything more than the filing of a complaint. These Supreme Court decisions clearly in-

dicate that The EEOC may be the entity which files a charge on behalf of the complainant with the FEP agency.

Argument 2.: The Fourth Circuit's holding that state proceedings were not "instituted" conflicts with the decision of the First Circuit in Isaac vs. Harvard University, 769 F.2d 817 (1st. Cir. 1985) and the cases cited therein, which held that state agency waiver constitutes "termination" of state proceedings under Section 706(c) of Title VII. The decision was, in fact, cited to the Fourth Circuit, but not discussed in their opinion.

Argument 3.: The Fourth Circuit's rationale for its holding, that the lack of MCHR playing "a substantive role in processing the charge" as indicative that the charges in the present case were not ini-

tially instituted proceedings with a state or local agency, is at odds with the rationale of this Court's Summary Dispositions of Ciccone vs. Textron, Inc., 449 U.S. 914 (1980) and Ewald vs. Great Atlantic & Pacific Tea Co., Inc., 449 U.S. 914 (1980) and a decision within the Fourth Circuit, City Corp Person-to-Person Financial Corporation vs. Brazell, 658 F.2d 232 (4th Cir. 1981) which held that state requirements are not preconditions to be read into the expanded federal time charging period, thereby allowing untimely State charges to be entitled to the 300-day filing period.

Argument 4.: The Fourth Circuit is changing the rules midstream!

As urged by the The EEOC in their Petition for Rehearing and Suggestion for Rehearing En Banc, the Fourth Circuit's opinion re-

solves a question of exceptional public importance and, if left untouched, will not only deprive scores of Title VII claimants of their day in Court, but will require wholesale revision of Work Sharing Agreements between The EEOC and state and local agencies to the detriment of federal-state cooperation, and will breed litigation as to whether state agency waiver provisions in Work Sharing Agreements satisfy the deferral requirement of Section 706(c), 42 U.S.C. 2000(e)-5(c), of Title VII. Mohasco and Oscar Mayer, supra, both reject more stringent and onerous requirements on claimants before they are allowed their day in Court.

Argument One

Over fifteen years ago, the Supreme Court in Love vs. Pullman Co., 404 U.S. 522, 523-24 (1971), made clear that the

statute's Section 706 deferral requirements are satisfied, thus clearing the way for federal filing, where, as here, The EEOC notifies the F.E.P. agency of a charge and the agency waives proces sing. In Love, The EEOC telephoned the Colorado Civil Rights Commission to state that it had received a charge of discrimination. By letter, the Colorado Commission "waived the opportunity to take further action on the petitioner's grievance" and The EEOC proceeded with its investigation. 404 U.S. at 524. In holding that this procedure complied with the Act, the Court stated that "[nothing] in the Act suggests that the State proceedings may not be initiated by The EEOC", with the charge held in suspended animation and automatically filed by EEOC upon "termination of state proceedings." 404 U.S. at 525-26 (emphasis supplied). Although the

precise issue was whether the charging party had to "refile" her Charge with The EEOC, it is clear that the Court considered The EEOC's telephone call to have "instituted" state procedings. The Supreme Court stated that this procedure "complied with the purpose both of Section 706(b) [now Section 706(c)] to give state agencies a prior opportunity to consider discrimination complaints, and of Section 706(d) [now Section 706(e)] to ensure expedition in the filing and handling of these complaints." 404 U.S. at 526.

The Court reaffirmed Love in Mohasco Corporation vs. Silver, 447 U.S. 807 (1980), where it held that "state proceedings were instituted by the The EEOC when it immediately forwarded [Silver's] letter to the State agency" (447 U.S. at 816; emphasis supplied) and that, consequently, the timeliness of Silver's EEOC

charge was to be evaluated under Section 706(e)'s extended 300-day filing period. Id. at 817.

Indeed, in light of The EEOC's policy of routinely transmitting charges to deferral agencies, and the limited 60-day duration of the Section 706(c) deferral period, the Court stated that a "Complainant in a deferral state... need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved." 447 U.S. at 815 n.16 (emphasis supplied). This unequivocal statement, combined with the Court's recognition in Love that a State's waiver does not diminish The EEOC's ability to "initiate" state proceedings, vitiates the Court of Appeal's decision below, inasmuch as Dixon lodged her EEOC Charge on the 229th day following her discharge and The

EEOC initiated proceedings with MCHR no differently than it did in Love.

The Supreme Court in Oscar Mayer & Co. vs. Evans, 441 U.S. 750 (1978) --construing Section 14(b) of the Age Discrimination in Employment Act [29 U.S.C. 633-(b)] and analyzing the analogous "commencement" provision in Section 706(c) of Title VII-- rejected the notion that "commencement" of state proceedings is conditioned upon anything other than the filing of a complaint. 441 U.S. at 758-60. Indeed, the Court made clear that "[i]ndividuals should not be penalized if states decline, for whatever reason, to take advantage of the[ir] opportunities" "to settle the grievances of [discrimination] claimants..." 441 U.S. at 761 (emphasis supplied). There is no basis for imposing more onerous requirements for the term "instituted" under Section 706(e) than for

the term "commenced" under Section 706(c). Cf. Saulsbury vs. Wismer and Becker, Inc., 644 F.2d 1251, 1256 n.5 (9th Cir. 1980); Smith vs. Oral Roberts Evangelical Association, Inc., 731 F.2d 684, 687-88 (10th Cir. 1984).

Argument 2.

The Fourth Circuit's holding that State proceedings were not "instituted" conflicts with the decision of the First Circuit in Isaac vs. Harvard University, supra, which held that state agency waiver constitutes "termination of the state proceedings under Section 706(c) of Title VII if a case is to be considered terminated before it ever begins." How can there be any requirement of initial consideration by the state when a case is considered terminated before it begins!

The present decision conditions the

availability of the extended federal filing period upon the state's ability and willingness to "play a substantive role in processing the Charge." This interpretation of the necessity of state action is in direct conflict with Isaac vs. Harvard University, supra, which allows the state agency to pre-determine, in conjunction with The EEOC the charges in which it wants to take a substantive role. The Court of Appeals has re-written the plainly worded Statute to require the state to participate on a case-by-case basis and has ignored the only requirement that the charge be "initially instituted" with the state.

Argument 3.

The issue of whether a charge filed with The EEOC or the notice to the state agency had to be done within the appropri-

ate state time limitations for consideration of state action was decided by this Court's Summary Dispositions in two cases, Ciccone vs.Textron Inc., supra, and Ewald vs. Greater Atlantic & Pacific Tea Company, Inc., supra. Both cases came to the Supreme Court where the 300-day period was not extended by the lower Courts to the claimant where the claimant failed to "dilligently seek a state administrat[ive] remedy." Ciccone vs. Textron, Inc., 616 F.2d 1216, 1220 (1980). By rejecting a contention that state filings and timely filings are pre-requisites for the 300-day extension, this Court vacated both decisions below. Moreover, several Circuit Courts have held that a timely charge need not be filed with the state in order to activate the 300-day filing period. City Corp Person-to-Person Financial Corporation vs. Brazell, 658 F.2d 232 (4th Cir.

1981), Rasimis vs. Michigan Department of Mental Health, 714 F.2d 614 (8th Cir. 1983), Owens vs. Ramsey Corporation, 656 F.2d 340 (8th Cir. 1981); Jones vs. Birco Carbide Chemical Co., 691 F.2d 1200 (6th Cir. 1982); Howze vs. Jones and Laughlin Steel Corporation, 750 F.2d 1208 (3rd Cir. 1984).

In Citicorp, supra, 658 F.2d at 234, the Court stated:

> In Oscar Mayer, the Supreme Court held that a somewhat comparable requirement of exhaustion of state remedies under the ADEA could be met by an untimely filing of a charge with the state agency, for Federal statutes did not provide that the prerequisite state charge must be filed within the time limit prescribed by State law.
>
> Oscar Mayer requires that we give Section 706(c) of Title VII a similar construction.

Argument 4.

By conditioning the availability of

Section 706(e)'s 300-day federal filing period upon the state's ability and willingness to "play a substantive role in processing the charge", the Court has contravened Congressional intent. In addi tion, the Court's decision voids hundreds of pending Title VII charges within the Fourth Circuit which were submitted between 181-300 days by laypersons in deferral jurisdictions who had every reason to believe that their charges were perfected with State FEP agencies and timely filed with The EEOC. Furthermore, the decision unravels congressionally authorized Work Sharing Agreements between EEOC and the state's and political subdivisions in this Circuit that represent a laudatory "method of cooperation which has evolved as the practical solution to the concurrent jurisdiction given by Title VII." Isaac vs. Harvard University, supra. The

division of labor achieved by this agreement is predicated on the state's voluntary waiver of their Section 706 exclusive proceeding rights over categories of charges. The Court of Appeals' holding essentially precludes state waiver of any charges filed after 180 days and forces the state to "play a substantive role in processing those charges", without regard to their ability or willingness to do so, in order to perfect a timely federal filing on behalf of the charging party. In addition, FEP agencies may not have the resources to investigate all such charges.

Moreover, under the Court of Appeals' decision, it is doubtful that state and local FEP agencies could safely waive initial processing rights of <u>any</u> category of charges, including those lodged <u>before</u> 180 days. There is no reason to suppose that Congress attached different meanings

to the terms "initially instituted" in Section 706(e)'s limitations provision and "commenced" in Section 706(c)'s deferral requirement. If, as the Court held, a charge over which the State waives initial processing cannot serve to "initially institute [ ] proceedings" with the state, one can forcefully argue that it is equally ineffectual to "commence [ ]" State proceedings under Section 706(c) which must be accomplished to perfect federal filing, regardless of timeliness.

Nothing in the language of Section 706(c) and (e), nor their legislative history, indicates that "commenced" or "initially instituted" means anything more than the terms plainly denote, i.e., that discrimination charges must be brought to the attention of state and local FEP authorities. Supreme Court precedent confirms this interpretation. Here, then,

proceedings were "initially instituted", at the minimum, when The EEOC transmitted a copy of Dixon's Charge to MCHR.

The Court of Appeal's rationale for conditioning the availability of Section 706(e)'s 300-day federal period upon the actual involvement of the FEP agency in initially processing the charge, viz., is that this FEP involvement is deemed to the only purpose for which the extra 120 days beyond the 180-day period was alloted. Such a rationale cannot withstand scrutiny. First, Congress could have tailored Section 706(e) to ensure that it only benefited individuals whose charges were, in fact, first investigated by the state. It did not do so. "[A] Court should [not] read in a time limitation provision that Congress has not seen fit to include...." Mohasco Corp. vs. Silver, 447 U.S. at 816 n.19 (citation ommitted), particularly in

a "statutory scheme in which laymen, unassisted by trained lawyers initiate the process." Love vs. Pullman, supra, 404 U.S. at 527. Cf. The EEOC vs. Shamrock Optical Co., 788 F.2d 491, 493-4 (8th Cir. 1986), concludes that the 300-day period applies, even though state proceedings are "initially instituted' beyond the State limitations period, by stating that "the fact that Section 706(e) tolerates disregard of state procedures and allows some complainants more time than others cannot justify our finding of a requirement in a statute, enacted by Congress, which neither the Supreme Court nor this Circuit nor any other Circuit has recognized".

Second, Dixon and countless others who have lodged their charges with EEOC between 180-300 days, had every reason to believe that EEOC would perfect their charges with the state. Love vs. Pullman,

supra, 404 U.S. at 525; Mohasco, Corp. vs. Silver, supra, 447 U.S. at 817; Isaac vs. Harvard University, supra, 769 F.2d at 819. To condition the timeliness of their charges upon the operation of Work Sharing Agreements between EEOC and FEP agencies, on agreement of which the public is generally unaware, is patently unfair and serves no salutory purpose. The fairer rule, which is faithful to the terms of Section 706(e) and endorsed by the Supreme Court, is to apply the 300-day period to charges filed in a deferral state where the state agency is apprised of such charges, regardless of whether it avails itself of the opportunity to resolve them in the first instance.

The Court of Appeal's decision wrongly impedes the operation of Congressionally authorized Work Sharing Agreements which promote Title VII's goals of

federal-state cooperation, deferral, and expeditious resolution of charges. State waiver of initial processing rights in certain categories of charges is a necessary condition of the "division of labor" achieved by Worksharing. Contrary to the Court's view, such waivers are in full accord with the Statute's deferral requirements. Those requirements were enacted to give state and local FEP agencies "a limited opportunity to settle the grievances of . . . claimants . . .local[ly]. . . so that grievants thereafter have no need or desire for independent federal relief." Oscar Mayer & Co. vs. Evans, supra, 441 U.S. at 761 (Interpreting Section 14(b) of the Age Discrimination in Employment Act, which is substantially similar with regard to deferral provisions of Title VII)(emphasis supplied); New York Gaslight Club, Inc vs. Carey, 447 U.S. 54, 63 (1980) (Ti-

tle VII). See also Doski vs. M. Goldseker Co., 539 F.2d 1326, 1331 (4th Cir. 1976) ("the state or local agency should be given first opportunity to act on the complaint")(emphasis supplied). Under the Work Sharing Agreements, the state has been given an opportunity to resolve claims in the first instance and, even by signing these agreements, the state retains the authority to proceed with a claim of which they are notified if they ellect and has only voluntarily relinquished that opportunity upon termination of consideration of the charge. The purpose of deferral has thus been satisfied.

The Court of Appeals' holding that waiver precludes "institution" of state proceedings for the purpose of obtaining the 300-day federal filing period, and its more ominous suggestion that it precludes deferral altogether would obliterate gains

in federal-state cooperation achieved by Work Sharing Agreements. State waiver of initial processing of any charge received by The EEOC more than 180 days after the discriminatory occurrence is now imposible under the Court's holding, lest the Claimant's federal filing be deemed untimely and his federal rights consequently forfeited. Even as to earlier charges, The EEOC and deferral agencies in the Circuit can abide by FEP waiver provisions only at the risk that the charge would be held invalid for failure to defer under Section 706(c).

Accordingly, as a result of the holding, state agencies will be forced to investigate charges they believe would be better processed by The EEOC or to simply hold the charge for 60 days, whereupon The EEOC will "file" the charge as authorized by Love vs. Pullman. This result flouts

both Section 706(c)'s solicitude for State's wishes during the 60-day deferral period, and Section 706(e)'s goal of expeditious resolution of Title VII claims.

CONCLUSION

This Honorable Court must take charge of the proper administration of Title VII and its filing requirements, thereby establishing uniformity and salvaging work sharing agreements.

Petitioner's charge is an "initially instituted" charge with an FEP agency, and is, thereby, entitled to a federal filing period of 300 days. The period was triggered in accorance with the sanctioned procedures set out in Love and Mohasco, supra, which, in this case, included The EEOC docketing of the charges, transmitting of the charge to The MHRC and The MHRC's election not to proceed. This

election may be made in advance, effect a class of cases and may further be reduced to writing in the form of a Work Sharing Agreement. Isaac, supra. The federal/-state scheme of administering Title VII charges, Statutes, Regulations and Legislative history all support utilization of Work Sharing Agreements.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of August, 1986, three copies of the above Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit and Appendix were mailed first class, postage prepaid, to Leonard E. Cohen, Esquire, FRANK, BERNSTEIN, CONAWAY & GOLDMAN, 300 East Lombard Street, Baltimore, Maryland 21202, attorney for Respondent; and three copies were mailed first class, postage prepaid, to Johnny J. Butler, General Counsel (Acting), EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 2401 E Street, N.W., Room 224, Washington, D.C. 20507.

Mark Herman

MARK E. HERMAN

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2033

Patricia A. Dixon,
Appellant,

vs.

Westinghouse Electric Corporation,
Appellee

and

Equal Employment Opportunity Commission,
Amicus Curiae,/A

and

Equal Employment Advisory Council,
Amicus Curiae,/E

Appeal from the United States District Court for the District of Maryland, at Baltimore. Joseph H. Young, District Judge. (C/A Y-83-3034)

Argued: February 4, 1986
Decided: April 10, 1986

Before WIDENER and HALL, Circuit Judges, and HAYNSWORTH, Senior Circuit Judge.

Mark E. Herman for Appellant; Leonard E. Cohen (Monte Fried; Mark Santangelo; Frank,Bernstein, Conaway & Goldman on brief) for Appellee; Peggy R. Mastroianni, Equal Employment Opportunity Commission (Johnny J. Butler, Acting General Counsel; Gwendolyn Young Reams, Acting Associate General Counsel; Susan Buckingham Reilly, Assistant General Counsel; Robert E. Williams; Douglas S. McDowell; William S. Franklin; McGuiness & Williams on brief) for Amicus Curiae.

HALL, Circuit Judge:

Patricia A. Dixon appeals from the district court's order granting summary judgment to her employer, Westinghouse Electric Corporation ("Westinghouse"), in her action brought pursuant to Title VII of the Civil Rights Act of 1964 U.S.C. Section 2000e, et seq. We affirm.

I

Dixon was employed by Westinghouse in its engineering and drafting department for more than ten years. On December 18, 1981, she received a mailgram from her supervisor notifying her that she was terminated from her employment.

Thereafter, Dixon filed a grievance concerning her termination with the Salaried Employees Association ("SEA"), of which she was a member. SEA attempted to

resolve the dispute concerning Dixon's termination through its collective bargaining agreement's grievance and arbitration procedures. The matter was grieved at a third step meeting under the local grievance procedure on March 15, 1982, and Westinghouse denied the grievance in writing. The grievance was not advanced to the next step of the grievance procedure -- the national appeal level. Thus, under the collective bargaining agreement, Westinghouse's written denial of the grievance was final and the matter was closed. Subsequently, on August 4, 1982, 230 days after her termination, Dixon filed a charge of sex discrimination with the Equal Employment Opportunity Commission ("EEOC").

In accordance with the Worksharing Agreement between EEOC and the Maryland Commission on Human Relations ("MCHR"), [1/] EEOC transmitted a Charge and Transmit-

tal Form 212-A to MCHR on August 6, 1982. On August 11, 1982, MCHR returned the Form 212-A to EEOC after checking the box which indicated that it would not process the charge. By letter dated August 11, 1982, MCHR informed Dixon that, because EEOC could better process her charge, MCHR had terminated its proceedings.

1/ It is EEOC's practice to enter into "worksharing" agreements with state anti-discrimination agencies in order to eliminate duplication of effort. See 29 C.F.R. 1601.13(c). These agreements assign each agency primary responsibility for investigating different categories of charges. Under section 4.c. of the Worksharing Agreement between MCHR and EEOC, "[t]he EEOC will take primary responsibility for processing all charges originally received by EEOC." In addition, section 4.c.6. provides that the EEOC." is to process all Title VII charges received by it "beyond six (6) months but before 300 days after the alleged violation." Section 4.d. states that the state agency "waives its exclusive rights to specific periods of initial processing" granted to it by

On November 2, 1982, following discussions between SEA, Westinghouse, and EEOC representatives, Westinghouse offered to reinstate Dixon. She was reinstated to her position as of January 3, 1983, at a salary she would have received had she been continuously employed between December 18, 1981, and January 3, 1983.

EEOC made no finding on Dixon's charge of discrimination but issued her a right to sue letter on June 16, 1983. Dixon then filed this action, alleging that Westinghouse had discriminated

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Title VII for those charges which the Worksharing Agreement assigns for initial processing to EEOC.

Section 5.d. of the Agreement provides for exceptions to the Worksharing provisions of section 4. Under section 5.d., where either MCHR or EEOC expresses interest in pursuing a charge which is the primary responsibility (under section 4) of the other agency, it can do so upon prompt notice to the other party.

against her on the basis of her sex, in violation of Title VII, and that the alleged conduct of Westinghouse constituted an intentional infliction of emotional distress, in violation of Maryland law. Westinghouse filed a motion for summary judgment and a supplemental motion for summary judgment.

The district court granted both Westinghouse's motion for summary judgment and its supplemental motion for summary judgment and dismissed the complaint. In doing so, the court held that Dixon's EEOC charge was untimely because she did not file it within 180 days of the alleged discrimination, as required under section 706(e0 of Title VII, 42 U.S.C., Section 2000e-5(e). The district court found that Dixon was not entitled to the extended 300-day charge-filing period provided in section 706(e), because she had not ini

tially instituted proceedings with MCHR. The district court further held that under the terms of the Worksharing Agreement between MCHR and EEOC, MCHR had waived the right to initially process the charge and it was, therefore, not authorized to process the charge before EEOC had resolved the claim. In addition, the district court held that Dixon's state tort claim was barred for failure to exhaust the grievance-arbitration procedures provided in the collective bargaining agreement to which she was subject at the time of her termination.

This appeal followed.

II

Dixon's primary contention on appeal is that the district court erred in holding that her EEOC charge was barred for failure to file it within 180 days of

her discharge. She further claims that the district court erred in determining that her state tort claim was barred for failure to exhaust the grievance-arbitration procedures. In addition Dixon alleges that the district court erred in concluding that Westinghouse did not waive any challenge to EEOC's jurisdiction by failing to first raise the issue with EEOC. Finally, she argues that, even if her EEOC charge was untimely filed, Westinghouse is equitably estopped from asserting the late filing as a defense. We reject all of appellant's contentions as meritless.

With respect to her allegation that the district court erred in holding that her EEOC charge was barred because it was not filed within 180 days of her dis charge, Dixon maintains that the sending of the Charge and Transmittal Form 212-A

to MCHR constituted a referral of the charge to the state agency within the meaning of section 706(e). She contends that MCHR processed the charge and, as evidenced by its notation on the Form 212-A, elected not to proceed on it. Appellant argues that because the charge was referred to the state agency, the extended 300-day time limit for filing provided in section 706(e), and not the 180-day limit, applied here. She asserts that the fact that EEOC did not refer the [2/] charge to

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2/ It is not necessary for us to decide the state statute of limitations issue here. Regardless of whether Dixon was required to file her charge withn the state's statute of limitations, the fact remains, as discussed infra, that Dixon did not initially institute an unlawful employment charge with MCHR.

MCHR within the state's statute of limitation did not make the filng of the charge untimely. Dixon relies upon an EEOC regulation which states that "[c]harges arising in jurisdictions having a 706 agency but which charges are apparently untimely under the applicable state . . . statute of limitations . . . are timely filed if received by the Commission within 300 days from the date of the alleged violation." 29 C.F.R., Section 1601.13(a).

We are unconvinced by appellant's arguments. Section 706(e) provides, in pertinent part, the following:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . ., except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a

> State or local agency with authority to grant or seek relief from such practice. . ., such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred.

42 U.S.C., Section 2000e-5(e) (emphasis added). The plain and unambiguous meaning of section 706(e) is that a Title VII charge is timely only if filed with EEOC within 180 days of the alleged discriminatory act. The only exception is when there is a state or local deferral agency and the charging party has initially instituted proceedings before that deferral agency. In such a situtation, the charge is deferred to that agency for "only one reason" --to give the state the opportunity to act and to "avoid federal intervention unless its need was demonstrated." Mohasco Corp. vs. Silver, 447 U.S. 807, 821 (1980) (footnote omitted). When such proceedings have been instituted in a de-

ferral state, a charge may be filed with EEOC until the 300th day, but not before the state agency has been give 60 days to consider the charge, unless state proceedings have terminated earlier. 42 U.S.C., section 2000e-5(C).

EEOC's promulgation of 29 C.F.R., section 1601.13(a), providing plaintiffs in deferral states 300 days in which to file charges with EEOC even if their state charges are untimely, cannot do away with the statutory requirement that a charge must initially instituted with the state agency in order for the 300-day filing period of section 706(e) to apply. As noted by the Supreme Court in Mohasco, EEOC's "'interpretation' of the statute cannot supersede the language chosen by Congress." 447 U.S. at 825 (footnote omitted). Section 706(e) expressly states that in order for the 300-day period for

filing EEOC charges to apply, the plaintiff must have "initially instituted proceedings with a State or local agency with authority to grant or seek relief from such [unlawful employment] practice." 42 U.S.C., section 2000e-5(e) (emphasis added). Such was not the situation here.

In the instant case, Dixon filed her EEOC charge 230 days after her termination. She filed no charge with MCHR, although EEOC did forward a copy of their charge to the state agency. Because under the Worksharing Agreement between MCHR and EEOC, MCHR had waived its right to process initially charges filed originally with EEOC, as well as those filed more than six months after the alleged violation, it was never contemplated that MCHR would play a substantive role in processing the charge. Moreover, the rationale for affording complainants in deferral states extra time to

file their EEOC claims is to allow them the opportunity first to pursue state remedies. This rationale is extremely lacking in this case, because the state had already waived its right to initially pro cess appellant's claim.

We conclude that EEOC's transmittal of the charge to MCHR was for informtional purposes only and did not constitute and "initially instituted" charge within the meaning of the statute. Dixon had not "initially instituted" proceedings with MCHR as required by Title VII and, consequently, she could not take advantage of the extended 300-day for filing Title VII charges. See Doski vs. M. Goldseker Co., 539 F.2d 1326, 1329-30 (4th Cir. 1976). Accordingly, we hold that because appellant did not file her EEOC charge within 180 days of her termination, her action was barred.[3/]

III

Upon consideration of the record, briefs and oral argument, we reject appellant's remaining contentions as meritless for the reasons stated by the district court. Dixon vs. Westinghouse Electric Corp., 615 F. Supp. 538 (D. Md. 1985).

IV

On the basis of the foregoing, the judgment below is affirmed.

AFFIRMED

3/ Because Dixon's EEOC charge was not filed until 230 days after her termination, we need not determine whether a filing with EEOC within 180 days and a referral by EEOC to the state agency would constitute a timely filing notwithstanding the fact that the state agency refuses to process the charge under the worksharing agreement because it was first filed with EEOC.

WORKSHARING AGREEMENT

Between

The Equal Employment Opportunity Commission
Baltimore District Office

and

The Maryland Commission on Human Relations

1. General

a. Inasmuch as it had been agreed between the Maryland Commission on Human Relations (hereinafter referred to as FEPA) and the Baltimore District Office of the Equal Employment Opportunity Commission (hereinafter referred to as the EEOC) that it is desirable to effect procedures to minimize duplication of effort in the processing of charges and to achieve maximum consistency of purpose and results, this agreement is hereby reached.

b. The FEPA has jurisdiction over allegations of employment discrimination in accordance with Article 49B, Maryland Code Annotated, as amended. The EEOC has jurisdiction over allegations of employment discrimination in accordance with Title VII of the Civil Rights Act, the Age Discrimination in Employment Act and the Equal Pay Act (EPA).

c. Where jurisdictional responsibilities overlap, it is the intent of the parties, to the extent possible, to use substantially compatible case handling Procedures and case processing forms.

2. Filing Charges of Discrimination

a. EEOC by this Agreement designates and establishes the FEPA as a limited agent of EEOC for the purpose of receiving charges on behalf of EEOC and the FEPA agrees to receive such charges. This delegation of authority does not include the right of the FEPA to make final determinations on the jurisdiction of EEOC over charges.

b. Each agency agrees to advise potential charging parties of their right to file with the other agency and will endeavor to help any person alleging discrimination in employment to draft a charge in a manner sufficient to satisfy the filing requirements of the other agency. Charges will be taken on a form mutually agreed upon by the parties.

3. Referral/Deferral of Charges

a. Each agency agrees to forward to the other agency within 48 hours of receipt all charges which may meet the jurisdictional requirements of the other agency. Such charges may be hand-delivered or sent by certified mail, return receipt requested. Each charge transmitted will be accompanied by an EEOC Form 155 and an EEOC Form 212-A, identified by charge number and indicating processing decisions made in accordance with this Agreement.

b. Charges received by one agency which ar to be initially processed by the other agency will be forwarded to the other agency with all supporting documents, including interview notes.

c. Upon receipt of a charge forwarded by the other agency, the receiving agency will review the charge and will respond to the sending agency within ten (10) work days of receipt of the charge. Such responses will be recorded on a copy of the EEOC Form 212-A which accompanied the charge. Responses shall include the accompanied receiving agency's charge number, acknowledgement of receipt where there is a concurrence with the sending agency's processing determination, or exceptions to the processing determination of the sending agency.

d. Each agency asserts that, after it has agreed that it will not process a charge, it will not subsequently decide to process that charge without the concurrence of the other agency, insofar as is possible.

4. Worksharing

a. Is the intent of both parties to avoid duplication of case processing efforts wherever possible. In order to achieve this objective, the EEOC and the FEPA agree to implement the following work-sharing provisions.

b. The FEPA will take primary responsibility for processing all charges originally received by the FEPA. In addition, the FEPA will assume primary responsibility for processing the following charges:

1. All charges received by EEOC against certain respondents if agreed to in writing by the parties.

2. Charges which allege at least one basis of discrimination which is no covered by EEOC.

3. Charges filed by the FEPA or its Commissioners.

c. The EEOC will take primary responsiblity for processing all charges originally received by EEOC, except as otherwise provided in paragraph 4(b). In addition, EEOC will process the following charges:

1. Charges filed by the EEOC or its Commissioners.

2. Charges where it is determined that immediate, temporary, or preliminary relief is appropriate and can be obtained most expeditiously through the federal courts.

3. Charges filed against the FEPA.

4. All charges received by the FEPA against certain respondents if agreed to in writing of the parties.

5. All charges which, in whole or in part, allege a violation of the Equal Pay Act and which are initially filed with EEOC.

6. All directed investigations under the Age Discrimination in Employment Act.

7. All charges covered under Title VI which are received by EEOC between 180 and 300 days after the alleged violation.

8. All charges identified by EEOC as referrals from other federal agencies that are against respondents who are recipients of federal financial assistance subject to 1) Title VI of the Civil Rights Act of 1964, 2) Title IX of the Educations Amendments of 1972, 3) State and Local Fiscal Assistance Act of 1972, as amended, and 4) provisions similar to Title VI and Title IX in federal grant statutes to the extent that such provisions are related to the prohibition of employment discrimination covered by Title VII and the Equal Pay Act of 1963. Charges in process by the FEPA as of October 1, 1982 are excluded and will be processed to completion by the FEPA.

9. All remaining charges not specifically reserved by this Agreement for the FEPA. Unless otherwise provided herein, charges received on the same day by both EEOC and the FEPA from the same Charging party against the same Respondent(s), shall be processed by EEOC.

d. In order to facilitate early resolution of charges, the FEPA hereby waives its exclusive rights to specific periods of initial processing which have been granted to the FEPA by Title VII for those charges assigned by this Agreement to EEOC for initial processing.

e. If for any reason an agency determines that it cannot process a charge for which it bears initial responsibility pursuant to this Agreement, that agency will immediately inform the other agency of its inability to process the charge, in writing.

5. Exceptions and Adjustment to Worksharing Provisions

a. The EEOC and the FEPA will periodically review paragraph 4 and make any necessary amendments.

b. It is understood and agreed that the division of primary responsibility for resolving charges must assign to each agency the number of charges that will most fully utilize its charge processing capacities. The implementation of this Agreement and any adjustments to this Agreement, will take into consideration the contractual requirements of the FEPA and will have the mutual consent of both parties.

c. Where either party has obtained a conciliation agreement or is administering or monitoring a legal order pertaining to a respondent, the party will, wherever possible, take primary responsibility for charges which are affected by such agreements or orders. The party wishing the exception will notify the other party immediately.

d. Any exceptions to worksharing provisions delineated in paragraph 4 above where either party expresses an interest in pursuing a charge over which it does not have primary responsibility for processing, the other party will wherever possible, refrain from assuming primary responsibility for processing the charge. The party wishing the exception will notify the other party immediately.

e. It is understood and agreed that charges of retaliation must receive prior-

ity. Both parties will endeavor to assure that this priority is met. Where one agency has a charge in active processing and a charge alleging retaliation is received by the other agency from the same Charging Party, against the same Respondent, that charge will be sent to the first agency to be consolidated with the original charge for processing. If the first agency is unable, for any reason, to promptly process this charge of retaliation, it will so notify the other agency in writing immediately.

6. Information Sharing

a. To facilitate charge processing activities each agency will make available, upon request of the other agency, copies of any records or documents acquired or developed in connection with charge processing, where such disclosure is not prohibited by law, regulations or inter agency agreement. Representatives of each agency, will be permitted to copy or obtain copies of such records or documents and to utilize the same in proceedings under their respective laws.

b. All communication regarding charges will include, insofar as possible, names of respondents and charging parties and EEOC and FEPA charge numbers.

c. Each agency agrees to comply with the confidentiality requirements of the other agency, especially with regard to records, documents or any other information obtained by one agency from the other agency. It is further understood and agreed that information, including information acquired or developed in connec-

tion with settlement or conciliation attempts, will not be made public where such disclosure would be contrary to statutory or regulatory provisions or policies applicable to settlement or conciliation proceedings. Sharing of such information, including information on settlement or conciliation attempts, by the EEOC and the FEPA with each other, shall not be deemed to be making such information public.

d. The EEOC may request or permit personnel of the FEPA to accompany and observe EEOC personnel on investigations and on conciliation of cases falling within their joint jurisdiction. Such procedures in no way shall detract from the responsibility of the EEOC under federal law.

e. The FEPA may request or permit personnel of the EEOC to accompany and observe FEPA personnel on investigations and conciliations of charges falling withnin their joint jurisdiction. Such procedures in no way shall detract from the responsibility of the FEPA under its law.

f. Both parties agree to provide each other with all resource and research data available and permitted by law, that will assist in the processing of charges.

7. Substantial Weight Review Process

a. The FEPA will provide a monthly report to EEOC of all actions taken on charges deferred to the FEPA for processing and of all actions taken on other charges received by the FEPA for EEOC. It is agreed that final actions may be reported on a weekly basis during the re-

porting month with the final submission made no later than the eighth (8) calendar day after the ending of the reporting month. Each report will include copies of written findings, agreements, final orders and other written findings, agreements, final orders and other final action closure documents in accordance with EEOC Order 916, Appendix A, Substantial Weight Review Proceduresand Appendix B, Certified FEP Agency Charge Review Procedures, and Appendix C, ADEA Contract Credit Review Manual. The final report will include EEOC Form 322, FEP Agency-Monthly Performance Report and a listing describing all charges and closure actions taken during the reporting month. The FEPA will make the case files available to the EEOC for review and, upon request, will provide copies of all evidence upon which such actions are based.

b. EEOC will give substantial weight to the final findings and orders of the FEPA in arriving at a determination as to whether reasonable cause exists. The final findings and orders will be reviewed to determine whether the practices prohibited and the remedies required are remedies required under federal law. Administrative closures and pre-determination settlements will be subject to the same review process as the final findings and orders of the FEPA.

c. EEOC will provide copies to the FEPA of all such reviews, evaluations and dispositions. Such reviews and evaluations will be designed to determine if the following items have been addressed in a manner to satisfy EEOC's standards:

1. All jurisdictional requirements.

2. Investigation of all issues alleged, with appropriate supporting documentation and theory.

3. Appropriate relief.

d. Where the EEOC does not accept the final findings and orders of the FEPA, the EEOC will provide copies to the FEPA of the determination letters, agreements or other closure documents subsequently issued by the EEOC.

8. Integration of Enforcement

a. To effectively integrate the enforcement or abilities of the FEPA and the EEOC, the FEPA will notify the EEOC when it determines it does not have the resources to take a case to hearing or to pursue litigation of a case/cases failing conciliation.

b. Thereafter. representatives of the FEPA and the EEOC will jointly review the above described case files. Following such review, the EEOC will determine what further enforcement action it will take.

9. Implementation of the Worksharing Agreement

a.Each Agency will designate one person as a liaison officer for the purpose of coordinating activities under this Agreement. insofar as possible, all requests for information and all questions concerning this Agreement and related matters will be handled by the designated

liaison officers.

b. Both parties will provide training to designated staff in order to assure that the purposes and intent of this Agreement are carried out effectively.

c. Representatives of each agency will meet ninety (90) days after the signing of this Agreement to review the Agreement and, if necessary, modify the agreement. The parties shall meet periodically thereafter to review the Agreement, but not less than once every six (6) months.

d. The terms and provisions of this Agreement may be renegotiated at any time by mutual consent of the parties.

10. Duration of this Agreement

a. This Agreement will remain in effect from October 1, 1985 to September 30, 1986.

b. The duration of this Agreement may be extended by mutual consent of the parties.

Dorothy E. Mead Director Baltimore District Office Equal Employment Opportunity	David L. Glenn Director Maryland Commission on Human Relations
August 30, 1985 Date	Date

SECTION 1601.13
FILING: DEFERRALS TO STATE AND LOCAL AGENCIES

(a) Initial presentation of a charge to the Commission.

(1) Charges arising in jurisdictions having no 706 Agency are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 180 days from the date of the alleged violation.

(2) A jurisdiction having a 706 Agency without subject matter jurisdiction over a charge (e.g., an agency which does not cover sex discrimination or does not cover nonprofit organizations) is equivalent to a jurisdiction having no 706 Agency. Charges over which a 706 Agency has no subject matter jurisdiction are filed with the Commission upon receipt and are timely filed if received by the Commission withn 180 days from the date of the alleged violaton.

(3) Charges arising in jurisdictions having a 706 Agency but which charges are apparently untimely under the applicable state or local statute of limitations are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 300 days from the date of the alleged violation. Copies of all such charges will be forwarded to the appropriate 706 Agency.

(4) Charges arising in jurisdictions having a 706 Agency and which charges are apparently timely under the applicable state or local statute of limitations, are to be processed in accordance with the Commission's deferral policy set

forth below and the procedures in paragraph (a)(5) of this section.

(i) In order to give full weight to the policy of section 706(c) of the Act, which affords State and local fair employment practice agencies that come within the provisions of that section an opportunity to remedy alleged discrimination concurrently regulated by Title VII and state or local law, the Commission adopts the following procedures with respect to allegations of discrimination filed with the Commission. It is the intent of the Commission to thereby encourage the maximum degree of effectiveness in the State and local agencies. The Commission shall endeavor to maintain close communication with the State and local agencies with respect to all matters forwarded to such agencies and shall provide such assistance to State and local agencies as is permitted by law and as in practicable.

(ii) Section 706(c) of Title VII grants States and their political subdivisions the exclusive right to process allegations of discrimination filed by a person other than a Commissioner for a period of 60 days (or 120 days during the first year after the effective date of the qualifying State or local law). This right exists where, as set forth in section 1601.70, a State or local law prohibits the employment practice alleged to be unlawful and a State or local agency has been authorized to grant or seek relief. After the expiration of the exclusive processing period, the Commission may commence processing the allegation of discrimination.

(iii) A 706 Agency may waive its right to the period of exclusive pro-

cessing of charges provided under section 706(c) of the Title VII with respect to any charge or category of charges. Copies of all such charges will be forwarded to the appropriate 706 Agency.

(5) The following procedures shall be followed with respect to charges which arise within the jurisdiction of a 706 Agency and which are apparently timely under the applicable state or local statute of limitations:

(i) Where any document, whether or not verified, is received by the Commission as provided in Section 1601.8 which may constitute a charge cognizable under Title VII, and where the 706 Agency has not waived its right to the period of exclusive processing with respect to that document, that document shall be deferred to the appropriate 706 Agency as provided in the procedures set forth below:

(A) All such documents shall be dated and time stamped upon receipt.

(B) A copy of the original document, shall be transmitted by registered mail, return receipt requested, to the appropriate 706 Agency, or, where the 706 Agency has consented thereto, by certified mail, by regular mail or by hand delivery. State or local proceedings are deemed to have commenced on the date such document is mailed or hand delivered.

(C) The person claiming to be aggrieved and any person filing a charge on behalf of such person shall be notified, in writing, that the document which he or she sent to the Commission has been forwarded to the 706 Agency pursuant to the provisions of section 706(c).

(ii) Charges which arise within the jurisdiction of a 706 Agency and which are apparently timely under the ap-

plicable state or local statute of limitations are deemed to be filed with the Commission as follows:

(A) Where the document on its face constitutes a charge within a category of charges over which the 706 Agency has waived its rights to the period of exclusive processing referred to in paragraph (a)(4)(iii) of this section the charge is deemed to be filed with the Commission upon receipt of the document. Such filing is timely if the charge is received within 300 days from the date of the alleged violation.

(B) Where the document on its face constitutes a charge which is not within a category of charges over which the 706 Agency has waived its right to the period of exclusive processing referred to in paragraph (a)(4)(iii) of this section, the Commission shall process the document in accordance with paragraph (a)(5)(i) of this section. The charge shall be deemed to be filing with the Commission upon expiration of 60 (or where appropriate, 120) days after deferral, or upon the termination of 706 Agency proceedings, or upon waiver of the 706 Agency's right to exclusively process the charge, whichever is earliest. Where the 706 Agency earlier terminates its proceedings or waives its right to exclusive processing of a charge, the charge shall be deemed to be filed with the Commission on the date the 706 Agency terminated its proceedings or the 706 Agency waived its right to exclusive processing of the charge. Such filing is timely if effected within 300 days from the date of the alleged violation.

(b) Initial presentation of a charge to a 706 Agency.

(1) When a charge is initially presented to a 706 Agency and the charging party requests that the charge be presented to the Commission, the charge will be deemed to be filed with the Commission upon expiration of 60 (or where appropriate 120) days after a written and signed statement of facts upon which the charge is based was sent to the 706 Agency proceedings, or upon waiver of the 706 Agency's right to exclusively process the charge, whichever is earliest. Such filing is timely if effected within 300 days from the date of the alleged violation.

(2) When a charge is initially presented to a 706 Agency but the charging party does not request that the charge be presented to the Commission, the charging party may present the charge to the Commission as follows:

(i) If the 706 Agency has refused to accept a charge, a subsequent submission of the charge to the Commission will be processed as if it were an initial presentation in accordance with paragraph (a) of this section.

(ii) if the 706 Agency proceedings have terminated, the charge may be timely filed with the Commission within 30 days of receipt of notice that the 706 Agency proceedings have been terminated or within 300 days from the date of the alleged violation whichever is earlier.

(iii) If the 706 Agency proceedings have not been terminated, the charge may be presented to the Commission within 300 days from the date of the alleged violation. Once presented, such a charge will be deemed to be filed with the Commission upon expiration of 60 (or where appropriate, 120) days after a written and signed statement of facts upon which the

charge is based was sent to the 706 Agency by certified mail or was otherwise received by the 706 Agency, or upon the termination of the 706 Agency proceedings, or upon waiver of the 706 Agency's right to exclusively process the charge, whichever is earliest. To be timely, however, such filing must be effected within 300 days from the date of the alleged violation.

(c) Agreements With Fair Employment Practice Agencies. Pursuant to section 705(g)(1) and section 706(b) of Title VII, the Commission shall endeavor to enter into agreements with 706 Agencies and other fair employment practice agencies to establish effective and integrated resolution procedures. Such agreements may include, but need not be limited to, cooperative arrangements to provide for processing of certain charges by the Commission, rather than by the 706 Agency during the period specified in section 706(c) and section 706(d) of Title VII.

(d) Preliminary relief. When a charge is filed with the Commission, the Commission may make a preliminary investigation and commence juridical action for immediate, temporary or preliminary relief pursuant to section 706(f)(2) of Title VII.

(e) Commissioner charges. A charge made by a member of the Commission shall be deemed filed upon receipt by the Commission office responsible for investigating the charge. The Commission will notify a 706 Agency when an allegation of discrimination is made by a member of the Commission concerning an employment practice occurring within the jurisdiction of the 706 Agency. The 706 Agency will be entitled to process the charge exlusively for a period of not less than 60 days if the 706 Agency makes a written request to the Com-

mission within 10 days of receiving notice that the allegation has been filed. The 60-day period shall be extended to 120 days during the first year after the effective date of the qualifying State or local law.

[46 FR 43039, Aug. 26, 1981, as amended at 46 FR 48189, Oct. 1, 1981]

Supreme Court, U.S.
FILED
AUG 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-181

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

PATRICIA A. DIXON,
Petitioner,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,
Respondent.

SUPPLEMENTAL APPENDIX TO THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I N D E X

Memorandum of United States District Court Judge Young 1

Order 30

Certificate of Service 32

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PATRICIA A. DIXON	*	
vs.	*	Civil No.
WESTINGHOUSE ELECTRIC	*	Y-83-3034
CORPORATION	*	

Filed: August 19, 1985

Mark E. Herman, Esquire, Baltimore, Maryland, counsel for the plaintiff.

Leonard E. Cohen, Esquire, Baltimore, Maryland, and Monte Fried, Esquire, Baltimore, Maryland, counsel for the defendant

YOUNG, United States District Judge

MEMORANDUM

I. BACKGROUND

The plaintiff instituted this action against her employer, Westinghouse Electric Corporation ("Westinghouse")

seeking a declaratory judgment and injunctive relief as well as money damages. In Count I of her complaint, she seeks recovery for discriminatory employment practices pursuant to 42 U.S.C., Section 2000--et seq. of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (Title VII). Count II alleges that these practices constitute the intentional infliction of emotional distress under Maryland law. Defendant has filed a motion and supplemental motion for summary judgment as to both Counts I and II of the complaint.

Plaintiff, an employee with more than ten years service in the defendant's drafting department, alleges that she was discharged on December 18, 1981 because of her sex. She also charges, in essence, that she was required to provide more documentation and verification of the medical

nature of her absence than were similarly situated male employees "out on disability."

Westinghouse contends that the plaintiff was discharged for excessive absenteeism after having missed substantial time from work before and after an automobile accident in June, 1980.[1/] Defendant also alleges that the plaintiff did not report regularly to her supervisor to aprise him of her situation and condition during these absences, and did not docu-

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1/ Plaintiff apparently sustained injuries to her neck, shoulder, jaw, and teeth (Plaintiff's Deposition, pp. 52-53), in a non-work related accident in front of the Westinghouse facility where she was employed in Anne Arundel County, Maryland. Plaintiff also states that she has suffered emotional distress as a result of her accident. (Id., pp. 54-57, 72, 73).

Uncontroverted evidence supplied by defendant Westinghouse indicates that the plaintiff was absent 36.6% of the available work days in 1978, 21/5% in 1979, 60% in 1980, and 42.9% in 1981. (Defendant's Exhibit #4).

ment and substantiate the reasons for her prolonged absences. Additionally, when reports were received concerning the plaintiff's condition, the information usually came from third parties (e.g., plaintiff's roomate, daughter, sister, and son), and often was ambiguous and contradictory. Defendant insists that the plaintiff was discharged pursuant to a provision in the collective bargaining agreement [2/] only after repeated requests

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[2/] This provision states that:

> An employee who is absent without permission for a period of five (5) working days, and the employee's supervisor, or in his absence, the Medical department, has not received a report during this period giving a satisfactory reason for such absence, shall be considered as having voluntarily quit unless he can show extenuating circumstances making it impossible for him to report. (See Brooks Deposition, pp. 194, 106-07).

for medical documentation went unanswered. Plaintiff is alleged to have been counseled, warned, and subjected to progressive discipline before she finally was discharged. Defendant also notes that it voluntarily reinstated the plaintiff to her prior position on January 3, 1983, at a salary she would have received had she been continuously employed between December 18, 1981 and January 3, 1983. [3/]

Following her termination in December, 1981, plaintiff challenged defendant's action in two separate proceedings. Initially she filed a grievance under the collective bargaining agreement in effect

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[3/] Defendant actually offered the plaintiff reinstatement on or about November 2, 1982 (Defendant's Exhibit #10 Plaintiff's Deposition, p. 293), and plaintiff resumed her position on January 3, 1983. (Defendant's Exhibit #10, Plaintiff's Deposition, pp. 34, 167, 320-21; Brooks Deposition, p. 320)

between Westinghouse and the Salaried Employees Association ("SEA"). Subsequently, on August 4, 1982, she filed a charge of discrimination with the EEOC, 230 days after her discharge. Plaintiff's grievance presumably was resolved by defendant's offer of reinstatement on November 2, 1982, following discussions between the union, company, and EEOC representatives. The EEOC made no finding on Dixon's charge. Instead, the Commission terminated its processing of the charge and issued plaintiff a Right to Sue Notice on June 16, 1983.

II. PLAINTIFF'S TITLE VII CLAIM

Section 706(e) of Title VII, 42 U.S.C., Section 2000-e-5(e), governs the filing of timely charges of discirmination with the EEOC. Subsection (e) states that:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred. . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with a state or local agency with authority to grant or seek relief from such practice... such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred.... (emphasis added).

"The effective filing of a timely charge with the EEOC is a prerequisite to the invocation of the administrative process within the EEOC, Section 706(c), and to the maintenance of an action in the district court." Citicorp v. Brazell, 658 F.2d 232, 234 (4th Cir. 1981)(citing Section 706(f)(1), 42 U.S.C., Section 2000-e-5(f)(1); Lopez vs. Sears, Roebuck, and Co., 493 F.Supp. 801, 804 (D. Md. 1980).

Defendant contends that plaintiff's claim is time barred because it was not filed within the 180 day period provided for such filings in Section 706(e). Plaintiff counters that the filing is timely under the subsection's 300 day filing period rather than the 180 day period, and submits that although she did not file a charge with any state or local agency, (Plaintiff's Deposition, p. 244), the 300 day filing period provided for discrimination charges "initially instituted" with a state or local agency should nonetheless apply because the EEOC transmitted the charge to the Maryland Commission on Human Relations ("MCHR"). (Plaintiff's Exhibits #1 and 1A; Affidavit of Leo Sanchez, paragraphs 2 and 3).

However, assuming that plaintiff's EEOC charge was transmitted to, and received by the MCHR, the charge is not ti-

mely filed with the EEOC because it was filed after the 180 day period had expired and state agency proceedings were never "initially instituted." Nor could such proceedings involving plaintiff's charge have been instituted in view of the contractual relationship which existed between the EEOC and the MCHR as illustrated by their Work Sharing Agreement. See Logan, 493 F.Supp. at 805.

Plaintiff vigorously disputes this proposition and cites numerous cases as well as a provision of the Code of Federal Regulations in support of her contentions. However, plaintiff's cases address the issue of whether a charge must be filed with a deferral state agency within the limitations period set forth in the applicable state statute in order to take advantage of the 300 day extended filing period under Title VII. See, e.g., Soble

vs. University of Maryland, 572 F.Supp. 1509, 1512-13 (D. Md. 1983); Rasimas vs. Michigan Dept. of Mental Health, 714 F.2d 614 (6th Cir. 1983); Jones vs. Airco Carbide, 691 F.2d 1200 (th Cir. 1982); these cases are distinguishable and the issue they address is separate and distinct from the question presented here --i.e., whether the mere submission of a transmittal form by the EEOC to the MCHR is sufficient to constitute an initially instituted charge by the plaintiff.

Lopez and the cases upon which it relies are persuasive and directly address this issue. In Lopez, the Court interpreted Section 706(e) and determined that the 180 day period for filing a charge with the EEOC rather than the extended 300 day period applied to the case where the EEOC had a Work Sharing Agreement with a county fair employment practices agency which

provided that the county would not act on charges initially received by the EEOC until the EEOC had "resolved" the matter. Lopez, 493 F.Supp. at 805. The Court reasoned that because of the Work Sharing Agreement, there was no contemplation on the part of the agencies that the county agency would process the plaintiff's case before the EEOC had an opportunity to resolve the matter, and therefore the EEOC's transmittal of the charge to the Montgomery County Human Relations Commission was for information purposes only. Id. Accordingly, the Court found that the plaintiff's charges were never "initially instituted" with the local deferral agency within the meaning of Section 706(e) because there was no filing with the county agency with the intention it would actually process the charge. Id.

The holding in Lopez relies in part

on Doski vs. Goldseker Co., 539 F.2d 1326 (4th Cir. 1976). There, the Fourth Circuit noted that "the meaning of the phrase [initially instituted] is well settled: the state or local agency should be given first opportunity to act on the complaint." Id. at 1330 (brackets added). Doski itself relied upon the reasoning in Ugiansky v. Flynn and Emrich Co., 337 F. Supp. 807 (D. Md. 1972), where this Court explained the circumstances under which the expanded filing period under Section 706(e) is available.

> [A]s long as the state commission has been afforded the first opportunity to act on the complaint, there is a period of 210 days [now 300 days] after the date of the alleged unlawful employment practice (or 30 days after the notice of the termination of the state commission proceedings, whichever period expires earlier, within which the compalint may be filed with the EEOC.

Id. at 809, n.4. [4/]

These cases hold that the expanded filing period in Section 706(e) was intended to allow state or local agencies sufficient time to process a discrimination charge before it is processed by the EEOC, and the expanded period is only available where the state or local agency has been afforded the first opportunity to act on the charge. In Lopez, the local agency had previously waived its right to process the charge through its Work Sharing Agreement with the EEOC. Thus the

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4/ See also, Mohasco Corp. vs. Silver, 447 U.S. 803 (1980), In Mohasco, the Supreme Court noted that the only reason for giving employees in deferral states (i.e, states with an agency having jurisdiction over discrimination claims) a longer period of time in which to file a charge of discrimination than employees in states without a deferral agency was" . . . to give state agencies an opportunity to redress the evil at which the legislation was aimed, and to avoid federal intervention unless its need was demonstrated." Id. at 821.

reason for the extended filing period under Section 706(e) was not present and the Court refused to afford the plaintiff additional time. Lopez, 493 F.Supp at 805.

Defendant is correct in its assertion that the reasoning and holding of Lopez compel a similar conclusion here. Although the order of filing is immaterial, id., and the expiration of the state statute of limitations does not preclude the processing of a charge filed with the state agency within the 300 day period provided in Section 706(e) where the agency is empowered to act, [5/] the expanded filing period in Section 706(e) is not available in situations where there is no opportunity whatsoever for the state deferral agency to process the charge before the EEOC does. In these situations transmittal of the charge from the EEOC to the deferral agency is purely for the informa-

tional purposes and does not constitute an "initially instituted" charge within the meaning of the Act. Lopez, 493 F.Supp. at 805. Where the state or local deferral agency is not empowered or authorized to act, either because of statutory or contractual limitations, there is no reason to allow additional time for filing charges under Section 706(e). See Mohasco, 447 U.S. at 821 (supra n.4) As it did in Lopez, the court will tie the

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5/ The Court in Lopez noted that charges must be timely filed with a state agency in order to be afforded the extended limitations period under Section 706-(e). However, the Fourth Circuit has subsequently determined that the untimely filing of a charge with the state agency (under state law) does not preclude the application of the 300 day extended filing period in a Title VII case. Citicorp, 658 F.2d at 234 (citing Oscar Mayer vs. Evans, 441 U.S. 750, 759 (1979) (applying the above holding to cases involving the comparable state exhaustion requirement under the Age Discrimination Employment Act)).

availability of the expanded period for filing in Maryland to the purpose of the statute which is for the state agency to be afforded the opportunity to act on a charge of discrimination before the EEOC does. The Court will not arbitrarily permit plaintiffs in states with deferral agencies, not authorized to process certain claims, more time to file such claims merely because the deferral agency exists. Section 706(e) facilitates the exhaustion of state remedies, see Citicorp, 658 F.2d at 234, but it has no effect when the state deferral agency is without authority to process a claim or where it is contractually precluded from doing so. See Lopez, 493 F.Supp. at 805.

Here, the MCHR was not authorized to process the plaintiff's discrimination charge at the time of filing because the state agency previously had waived its

right to be afforded the first opportunity to act on such charges under the terms of its Work Sharing Agreement with the EEOC. [6/] The agreement provides that the EEOC will take primary responsibility for processing all charges originally received by it, (Defendant's Exhibit 15, Work Shar-

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[6/] The Work Sharing Agreement in effect at the time the plaintiff's charge was filed with the EEOC (August 4, 1982) was executed by Dorothy E. Mead, Director of the Baltimore District Office of the EEOC on January 20, 1981, and by David Glen, Executive Director of the MCHR on February 10, 1981. The Work Sharing Agreement states inter alia, that:

> [the Maryland Human Relations Commission] hereby waives its exclusive right to specific periods of initial processing which have been granted to [it] by Title VII for those charges assigned by this Agreement to EEOC for initial processing.

(See Defendant's Exhibit 15, Work Sharing Agreement 14.d). (emphasis added).

ing Agreement, paragraph 4.c), as well as those charges received by the EEOC more than six months, but less than 300 days, after the alleged violation. (Id., at paragraph 4.c.6.). Both of these waiver provisions in the Work Sharing Agreement provide a basis for the EEOC's primary and exclusive processing responsibility with regard to the plaintiff's charge. The plaintiff's charge originally was received by the EEOC and it was received more than 6 months but less than 300 days from the alleged discriminatory discharge on December 18, 1981; therefore, there was no expectation or intention on the part of the EEOC and the MCHR that the state agency would process or handle the plaintiff's charge even if the charge was transmitted to the MCHR. Thus, under these circumstances, the transmittal of the plaintiff's charge by the EEOC to the MCHR was

for information purposes only. See Lopez, 493 F.Supp. at 805. The transmittal was not undertaken in contemplation of any substantive action being taken by the MCHR. [7/] The rationale for allowing the extended time filing period under Section 706(e) --that the first opportunity to act on a charge of discrimination be afforded to the state deferral agency where appropriate -- is lacking here as it was in Lopez.

7/ The plaintiff received a letter from the MCHR indicating that the Commission would take no action concerning her complaint because "it [had] determined that [her] charge [could] best be processed by the Equal Employment opportunity Commission (EEOC)." (Plaintiff's Exhibit 2, MCHR letter of August 11, 1982 to Patricia Dixon. To suggest that the determination referred to in the above mentioned letter constitutes substantive action (on the part of the MCHR) sufficient to bring plaintiff's charge within the class of charges to which the extended filing period is aplicable, is to elevate form over substance. Moreover, this sug-

Plaintiff's reliance on 29 C.F.R. Section 1601.13 [8/] is also unavailing. The Court will construe this regulation in a manner consistent with the statutory framework of Title VII and the rationale underlying the extended time provision in Section 706(e). This regulation, like the cases relied upon by the plaintiff, applies the 300 day extended filing period to those charges filed with EEOC after the state period for filing has expired but

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gestion ignores the provisions of the Work Sharing Agreement which give exclusive processing responsibility to the EEOC where charges like the plaintiff's are filed. (Defendant's Exhibit 15, Agreement paragraph 4.c. and 6.). It also ignores the information provided on the EEOC Transmittal Form No. PT882-C295-SX which indicates that the plaintiff's charge was initially received by the EEOC and that the EEOC had responsibility for initially processing the charge. (Plaintiff's Exhibit 1).

8/ 29 C.F.R. 1201.13(a)(1981) reads:

where the state deferral agency is otherwise empowered to act on the charges. The Court will not read this regulation as applying the extended filing period to charges filed with the EEOC after 180 days where, as either a statutory or contractual matter, the state agency, in essence, is not authorized to process a charge before the EEOC has resolved the claim. To hold otherwise would attribute meaning to the regulation inconsistent with the statutory purpose of Section 706(e). Cer-

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Charges arising in jurisdiction having a 706 Agency but which under the applicable state or local statute of limitations are filed with the Commission upon receipt. Such charges are timely filed if received by the Commission within 300 days from the date of the alleged violation. Copies of all such charges will be forwarded to the appropriate 706 Agency.

tainly, the EEOC may not create or expand the statutory jurisdiction given to it by Congress. Mohasco vs. Silver, 447 U.S. 807 (1980). Thus, the 180 day filing period is applicable to plaintiff's discrimination charge and the charge is, therefore, untimely.

The Supreme Court has held that the filing of a timely charge is not jurisdictional and therefore, is subject to waiver. Zipps vs. Trans World Airlines, 455 U.S. 385, 393 (1982). However, defendant will not be held to have waived its objection to the timeliness of plaintiff's charge because of its failure to litigate the matter before the EEOC. The EEOC's firm opposition to the Lopez analysis as indicated by its direct participation as amicus curiae, its apparent refusal to consider Lopez in promulgating 29 C.F.R. 1601.13, and its position that an advance

waiver is equivalent to a termination of state proceedings, see 46 Fed. Reg. 43037, 43038 (August 26, 1981), rather than a waiver of the right to act altogether, indicates that litigating plaintiffs' claims before the EEOC would have been a wholly futile act and would not have expedited the resolution of the instant controversy. The Court will not deem the defendant to have waived its objections to the plaintiff's charge because of its failure to avail itself of the opportunity to present its claim in a clearly unavailing forum.

Although the filing of a timely discirmination charge is also subject to equitable tolling and estoppel, Zipps, 455 U.S. at Citibank, 658 F.2d at 234, this is not an appropriate case in which to apply these principles because "there are no. . . equities which would permit the plaintiff to bring herself within the rule[s]

application." Id.

Plaintiff was discharged on December 18, 1981. She admits having received notice of her termination on December 19, 1981, (Plaintiff's Deposition, p. 47), yet plaintiff inexplicably failed to file her charge with the EEOC until almost eight months later. [9/] Plaintiff was represented by counsel throughout and should have

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[9/] The charge of discrimination which plaintiff filed with the EEOC confirms the fact that plaintiff understood that she had been terminated on or about the date which she was terminated. Plaintiff indicates that her lawyer initially told her that the defendant was going to rescind her termination. However, by "sometime" in January, 1982, plantiff definitely knew that the defendant was not going to rescind her termnation. (Plaintiff's Deposition, p. 205). Thus, even if plaintiff did not learn of this refusal to rescind her termination until January 31, 1982, and assuming arguendo that this date is used to determine when defendant's alleged act of discrimination occurred, plaintiff still did not file a timely charge of discrimination with the EEOC within 180 days.

been aware of the judicial decision in this district which held that the 180 day limitations rule applies to charges filed with the EEOC which may not be acted upon by the MCHR. Lopez, 493 F.Supp. at 805. Although plaintiff had no control over the procedural requirements for the filing of a timely charge before the EEOC, she did know, or should have known of the 180 day rule, or of the controversy surrounding the interpretation of the statute of limitations.

Having found that plaintiff's claim of discrimination is time barred, and that neither waiver, tolling, nor estoppel principles are appropriate for application in this case, plaintiff's Title VII claim accordingly will be dismissed.

III. PLAINTIFF'S INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM

The facts alleged by the plaintiff in support of her claim under Title VII are essentially the same facts which she contends constitute a claim for the intentional infliction of emotional harm under Maryland law. (See Plaintiff's Complaint, Count II). Although plaintiff makes no mention of the collective bargaining agreement in existence at the time of her termination, plaintiff's state law claim is nonetheless based on the "outrageous conduct" which forms the basis of a breach of the collective bargaining agreement. See Morris vs. Owens-Illinois, No. 82-1788 (Feb. 22, 1984), The Daily Record, March 31, 1984, at 1, col. 4. Through her state claim the plaintiff is essentially attempting to enforce her right to continued employment in the absence of just cause

for discharge pursuant to the terms of the collective bargaining agreement. Thus, federal law governs the resolution of this claim. See Textile Workers Union of America vs. Lincoln Mills, 353 U.S. 448 (1957).

Federal labor policy requires that an employee covered by a collective bargaining agreement exhaust any contractual remedies, such as grievance and arbitration, before bringing suit for violation of the collective bargaining agreement. See Republic Steel Corp. vs. Maddox, 379 U.S. 650, 652 (1965). Contract grievance procedures are the preferred method for settling disputes and stabilizing the "common law" of the plant, Id. at 653, and an "aggrieved employee [whose contractual remedies have not been exhausted] cannot sidestep a federally mandated grievance process merely by pleadings emotional in-

jury." Morris, supra, at 2, col. 1, (Citing Magnuson vs. Burlington Northern, 576 F.2d 1367, 1369 (9th Cir.), cert. denied, 439 U.S. 930 (1978).

Plaintiff has not exhausted her contractual remedies. The collective bargaining agreement between Westinghouse and the Salaried Employees Association contained an exclusive grievance and arbitration procedure for handling claims or wrongful discharge. (Agreement Sections XV, XV-A). The agreement specifically provides that in the event a grievance is not processed beyond the third step Local Grievance Procedure to the National Appeal Level within thirty days after the company has given its written answer at the third step level, the union "shall not be considered as having fully exhausted the grievance procedure." (Agreement Section XV-(2)(D)(2)). Neither the Union nor the

plaintiff pursued the grievance beyond the third step after the defendant gave its written notice rejecting the grievance. Plaintiff's greievance was not processed beyond the third step. (See Defendant's Exhibit D). Thus, it is clear that the plaintiff has failed to exhaust the grievance-arbitration procedures provided in the collective bargaining agreement and she may not maintain her claim alleging the intentional infliction of emotional harm. See Morris, supra, at 2, col. 1. Accordingly, defendant's supplemental motion for summary judgment will be granted and judgment entered for defendant.

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United States District

Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

PATRICIA A. DIXON	*	
vs.	*	Civil No.
WESTINGHOUSE ELECTRIC	*	Y-83-3034
CORPORATION	*	

* * * * * * * * * * *

O R D E R

For the reasons stated in the accompanying memorandum attached hereto, it is the 19th day of August, 1985, by the United States District Court for the Distrit of Maryland, ORDERED:

1. That defendant's motion for summary judgment with regard to Count I of plaintiff's complaint BE, and the same IS hereby GRANTED;

2. That defendant's supplemental motion for summary judgment with regard to Count II of plaintiff's complaint BE, and the same IS, hereby GRANTED;

3. That JUDGMENT BE ENTERED in favor of the defendant; and

4. That a copy of this Memorandum and order be mailed to counsel.

_____

United States District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of August, 1986, three copies of the above Supplemental Appendix to the Petition for certiorari to the United States Court of Appeals for the Fourth Circuit was mailed first class, postage prepaid, to Leonard E Cohen, Esquire, FRANK, BERNSTEIN, CONAWAY & GOLDMAN, 300 East Lombard Street, Baltimore, Maryland 21202, attorney for Respondent; and three copies were mailed first class, postage prepaid, to Johnny J. Butler, General Counsel (Acting), EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 2401 E Street, N.W., Room 224, Washington, D.C. 20507.

Mark Herman

MARK E. HERMAN

Supreme Court, U.S.
FILED
SEP 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-181

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

PATRICIA A. DIXON,

Petitioner,

v.

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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September 5, 1986

The Daily Record Co., Baltimore, MD 21202

QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals properly concluded that Petitioner's charge was never initially instituted with an agency having authority to process her charge because the Maryland Commission on Human Relations (hereinafter "MCHR") had contractually waived its right to process the charge pursuant to a work-sharing agreement between the MCHR and the Equal Employment Opportunity Commission (hereinafter "EEOC") prior to the EEOC's transmittal of a copy of the charge to the MCHR.

LIST OF PARTIES

Pursuant to Rules 21.1(b) and 28.1, Respondent states that the following parties appeared in the United States Court of Appeals for the Fourth Circuit:

> Patricia A. Dixon, Petitioner: an individual with no corporate affiliates; and
>
> Westinghouse Electric Corporation, Respondent: a corporation with corporate affiliates.[1]

[1] Said corporate affiliates are listed in Respondent's Appendix 1a-4a.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
STATEMENT OF THE CASE	2
REASONS THE WRIT SHOULD BE DENIED:	
I. The Decision Below Is Narrow And Does Not Present An Issue For Supreme Court Review	5
II. There Is No Conflict With The Decisions Of This Court Or Among The Circuits	6
III. Review By This Court Is Neither Appropriate Nor Necessary	8
CONCLUSION	10
APPENDIX (RULE 28.1 LIST)	1a

TABLE OF AUTHORITIES

Cases

Isaac v. Harvard University, 769 F.2d 817 (1st Cir. 1985)	7-8
Mohasco Corp. v. Silver, 447 U.S. 807 (1980)	7, 9

Statutes

Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1972)	3-8

No. 86-181

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WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Westinghouse Electric Corporation, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the Fourth Circuit's decision in this case.

OPINIONS BELOW

The Opinion of the District Court is reported at 615 F. Supp. 538 (D.C. Md. 1985) (Pet. Supp. App. 1-29). The opinion of the Court of Appeals is reported at 787 F.2d 943 (4th Cir. 1986) (Pet. App. 39-53).

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on April 10, 1986. A Petition for a Writ of Certiorari was filed on July 9, 1986, but rejected by the Clerk of the U.S. Supreme Court because it did not conform to Supreme Court Rules. A second Petition for a Writ of Certiorari was substituted and accepted by the Clerk on August 4, 1986, 26 days after the initial filing was attempted and 116 days after the judgment of the court below was entered. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

The instant case comes before this Court on Petition for a Writ of Certiorari from a ruling of the Court of Appeals for the Fourth Circuit. The controversy involves a work-sharing agreement between the EEOC and the MCHR wherein the MCHR waived its right to process certain categories of charges initially filed with the EEOC. The charge of discrimination filed by Petitioner, Patricia A. Dixon (hereinafter "Dixon" or "Petitioner"), was within the category of charges over which the MCHR had waived jurisdiction.

Dixon was employed by Westinghouse Electric Corporation (hereinafter "Westinghouse" or "Respondent") as a drafter in its engineering and drafting department. On December 18, 1981, her employment with Westinghouse was terminated.

Following her termination, Dixon filed a grievance with the Salaried Employee's Association (hereinafter "SEA"), of which she was a member, grieving her termination. Her grievance was not advanced after the third step meeting.

This rendered Westinghouse's written denial of her grievance at that level as final and the matter was closed.[2]

Dixon also filed a Charge with the EEOC on August 4, 1982, 230 days after her termination, alleging sex discrimination. No charge was filed by Dixon with any Maryland employment discrimination agency.

At the time Dixon's charge was filed with the EEOC, the EEOC and the MCHR were parties to a work-sharing agreement entered into on February 10, 1981. One of the purposes of this agreement was to establish procedures to minimize duplication of efforts in the handling of charges deferred pursuant to Section 706(c) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e-5(c). The work-sharing agreement provided that the EEOC would take primary responsibility for processing all charges originally received by the EEOC (paragraph 4.c); in addition, the agreement specifically provided that the EEOC would take primary responsibility for processing all charges covered under Title VII received by the EEOC more than six months but less than 300 days after the alleged violation (paragraph 4.c.6). Both of those conditions prevailed with respect to Dixon's charge; consequently, the MCHR had relinquished any jurisdiction with regard to her charge.

In accordance with the work-sharing agreement between the EEOC and the MCHR, EEOC transmitted a copy of the charge and a transmittal form 212-A to the

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[2] Dixon was subsequently reinstated to her position at Westinghouse on January 3, 1983 after discussions between the SEA and Westinghouse. She received the salary she would have been paid had she been continuously employed between December 18, 1981 and January 3, 1983.

MCHR on August 6, 1982. The MCHR returned the form 212-A on August 11, 1982 indicating, in accordance with the work-sharing agreement, that it would not process the charge.

On June 16, 1983, the EEOC issued Dixon a right to sue letter, having made no specific finding regarding the merits of her charge. Dixon thereafter filed an action in the United States District Court for the District of Maryland alleging discrimination based on her sex and intentional infliction of emotional distress by Westinghouse. Westinghouse filed a Motion for Summary Judgment and a Supplemental Motion for Summary Judgment, both of which were granted by the District Court, dismissing the complaint. The District Court held that the contractual waiver by the MCHR of its right to initially process the charge in the work-sharing agreement between the MCHR and the EEOC resulted in Dixon's charge never having been "initially instituted" with the MCHR. Since the charge was never initially instituted with the MCHR as required by Section 706(e), the Court reasoned that the extended 300-day time period for filing with the EEOC in Section 706(e) was not available and that the regular 180-day period controlled. Dixon's complaint was therefore untimely in that it was filed on the 230th day.[3]

Dixon appealed the District Court's decision to the U.S. Court of Appeals for the Fourth Circuit. The Fourth Circuit affirmed the decision below solely on the ground that since the MCHR had contractually waived its right to process Dixon's charge in the work-sharing agreement, her charge was never initially instituted with the MCHR

[3] The Court also held that Dixon's tort claim was barred for failure to exhaust the grievance-arbitration procedures provided in the collective bargaining agreement to which she was subject at the time of her termination.

and the extended 300-day filing period of Section 706(e) was not available to her.

REASONS THE PETITION SHOULD BE DENIED

I.

THE DECISION BELOW IS NARROW AND DOES NOT PRESENT AN ISSUE FOR SUPREME COURT REVIEW.

The Fourth Circuit's well-reasoned conclusion that Petitioner's charge was not initially instituted with the MCHR was based on the MCHR's advance contractual waiver of its right to process the charge in its work-sharing agreement with the EEOC. The Court of Appeals further reasoned that because of this contractual waiver by the MCHR, Petitioner's charge was never initially instituted with a state agency having authority to process the charge as required under Section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), and therefore the 300-day extended filing period in Section 706(e) did not apply.

Contrary to Petitioner's assertions, the decision of the Fourth Circuit was not based in any way upon the issue of whether Petitioner's charge would have been timely under state law had it been filed with the state agency. In fact, the Court specifically stated in footnote 2 that it was *not* addressing the state statute of limitations issue. 787 F.2d at 945.

The only issue addressed by the Fourth Circuit was the effect of the contractual waiver of jurisdiction by the MCHR in the work-sharing agreement. There is no dispute that the MCHR waived its jurisdiction over Petitioner's charge in the work-sharing agreement with the EEOC and that the EEOC and the MCHR had the authority, pursuant to Section 709(b) of Title VII, to enter into the work-sharing agreement. The Fourth Circuit

simply applied the terms of the work-sharing agreement to the present situation in finding that the transmittal of Petitioner's charge by the EEOC to the MCHR was for informational purposes only. No other conclusion would have been logical.

After concluding that the charge was never instituted with the MCHR, the Court went on to apply the plain language of Section 706(e). Section 706(e) of the Act provides:

> A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case of an unlawful employment practice with respect to which the person aggrieved has *initially instituted* proceedings with a State or local agency *with authority to grant or seek relief from such practice* . . . such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred. . . . (Emphasis added).

Because the MCHR had waived jurisdiction it lacked authority to consider Petitioner's charge and could not, therefore, be considered a deferral agency for purposes of her charge. Thus, the Fourth Circuit properly concluded that Petitioner was limited to the 180-day filing period.

II.

THERE IS NO CONFLICT WITH THE DECISIONS OF THIS COURT OR AMONG THE CIRCUITS.

Nothing in the Fourth Circuit's decision conflicts with any decisions by this Court or by any Circuit Court. In fact, neither this Court nor any other Circuit Court has even considered the work-sharing agreement issue involved in this case.

Petitioner's contention that the Fourth Circuit's decision conflicts with the decisions of this Court is totally without

merit. This Court has stated that the only reason for the extended filing period is to give state agencies an opportunity to process and remedy discrimination charges.

> *The [legislative] history identifies only one reason for treating workers in deferral States differently from workers in other States: to give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated.* The statutory plan was not designed to give the worker in a deferral State the option of choosing between his state remedy and his federal remedy, nor indeed simply to allow him additional time in which to obtain state relief. Had that been the plan, a simple statute prescribing a 90-day [now 180-day] period in nondeferral States and a 210-day [now 300-day] period in deferral States would have served the legislative purpose. Instead, Congress chose to prohibit the filing of any federal charge until after state proceedings had been completed or until 60 days had passed, whichever came sooner. (Emphasis added) *Mohasco Corp. v. Silver*, 477 U.S. 807, 821 (1980).

As recognized by the Fourth Circuit in its decision, Section 706(e) expressly states "that in order for the 300-day period for filing EEOC charges to apply, the plaintiff must have *initially instituted* proceedings with a State or local agency *with authority to grant or seek relief* from such [unlawful employment] practice. 42 U.S.C. § 2000e-5(e)." 787 F.2d at 945-946. (Emphasis added) Since the MCHR in the present case relinquished any authority to handle the charge, Maryland was tantamount to a non-deferral state for purposes of this case.

The only Circuit Court decision cited by Petitioner as being in conflict with the Fourth Circuit's decision did not address the "institution" of proceedings with a state deferral agency: it addressed the "termination" of proceedings by a state agency. In that case, *Isaac v. Harvard*

University, 769 F.2d 817 (1st Cir. 1985), not only was the charge transmitted to the state agency but the state agency actually acted upon the charge and even issued a finding. There was never a question concerning initial institution of the charge with the state agency. While the issue in *Isaac* is not relevant to *Dixon*, the rationale employed by the *Isaac* court of giving states the opportunity to remedy discrimination charges is in complete accord with the Fourth Circuit's rationale in *Dixon*.

III.

REVIEW BY THIS COURT IS NEITHER APPROPRIATE NOR NECESSARY.

Petitioner argues that the Fourth Circuit's decision would play havoc with the EEOC's many work-sharing agreements with state and local deferral agencies. This argument is just another example of the time-worn "parade of horribles" invoked to defend an indefensible position.

Section 709(b) of Title VII, 42 U.S.C. 2000(e)-8(b), empowers the EEOC to enter into written agreements with state or local discrimination agencies regarding jurisdiction over particular charges. The 1981 work-sharing agreement between the EEOC and the MCHR which was in effect at the time Petitioner filed her charge of discrimination was entered into pursuant to Section 709(b)'s grant of authority.[4] Section 709(b) also specifically permits the EEOC to revise any work-sharing agreement. If the EEOC believes that the Fourth Circuit's decision somehow upsets its current work-sharing agreement with the MCHR, all the EEOC has to do is revise the agreement in order to bring it into conformity with the

[4] It should be noted that Petitioner makes reference to, and has copied in her appendix, a work-sharing agreement between the EEOC and the MCHR executed in 1985, and not in effect at the time Petitioner filed her charge (Pet. App. 54-64). While the relevant paragraphs of the agreement have not changed substantively, paragraph 4.c.6 of the 1981 agreement is now paragraph 4.c.7 in the 1985 agreement.

decision. Surely the EEOC is supposed to follow the law — the law is not supposed to follow the EEOC.

Petitioner finally asserts a fairness argument: that lay claimants should only be required to comply with the 300-day extended filing period for all charges in deferral states. A similar argument was advanced in *Mohasco* wherein it was argued that a lay person would always assume he had 300 days within which to file. This Court quickly dispensed with that argument in *Mohasco*, stating that it was more likely that a lay person would, and should, regard the general obligation of filing within 180 days as the standard of diligence to satisfy. 447 U.S. at 825.

CONCLUSION

Since the Fourth Circuit is the first Circuit Court to deal with the effect of a work-sharing agreement between the EEOC and a state agency on the 300-day extended filing period under Title VII, its decision in this case obviously does not conflict with any decision of this Court or of any other Circuit. Petitioner has not shown one instance of conflict. This case has been decided under well-settled principles of law and does not raise any question which requires consideration by this Court. Therefore, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

RULE 28.1 LIST

Westinghouse Electric Corporation affiliates and subsidiaries (other than wholly owned subsidiaries) are:

Name	*Incorporated In*	*% of Ownership*
Compagnie des Dispositifs Semiconducteurs Westinghouse (CDSW)	France	81.3
Eletrocontroles Villares, Ltda. (EVL)	Brazil	30
Electronic Office Centers of America Corporation	Delaware	45.37
Eletromar Industria Eletrica Brasileira, S.A.	Brazil	61.8
Email Limited	Australia	.3
Ercole Marelli & Company, S.p.A.	Italy	1.9
Escorts, Ltd.	India	1.4
Franco Tosi S.p.A.	Italy	.3
Galileo Argentina C.I.S.A.	Argentina	40.3
Galileo Uruguaya, S.A.	Uruguay	91.7
Industria IEM, S.A. de C.V.	Mexico	9
Infrared Fiber Systems, Inc.	Delaware	48
Innovative Technologies, Inc.	Delaware	50
Maihak A. G. (H.)	West Germany	89
Mecanica Pesada, S.A.	Brazil	2.1
Mex Control S.A. de C.V.	Mexico	49
Mictron, Inc.	Missouri	45
Mitsubishi Electric Corporation	Japan	1.27
Mitsubishi Nuclear Fuel Co., Ltd.	Japan	34
Perceptics	Tennessee	38.
Powerex, Inc.	Delaware	45

Name	*Incorporated In*	*% of Ownership*
Project Funding Corporation	Delaware	33.3
Schneider S.A.	France	.63
Sentec Corporation	Delaware	49
Serratosa & Castello, S.A.	Uraguay	5.9
Siam di Tella, Ltd.	Argentina	4.17
Siam di Tella, Ltd.	Uraguay	5.9
Silectra S.A. de C.V.	Mexico	40
Siliconix, Inc.	California	35.3
Speech Plus	California	11
Theta J. Corporation	Massachusetts	3.4
Toshiba Westinghouse Electronics Corporation	Maryland	50
Turbine Metal Technologies, Inc.	Washington	30
Tyree Industries Limited	Australia	68.8
Tyree-Power Construction Limited	New Zealand	49.9
Westralian Transformers Pty. Limited	Australia	37.5
United Western Technologies Corp.	Delaware	10
Vektron S.A.	Mexico	24.5
W.S. Insulators	India	2.5
WM Power Products, Inc.	Delaware	50
Porta Pack Corporation	Delaware	50
Horizon International Television, Inc.	California	50
Westinghouse Canada Inc.	Canada	95.15
Industrias Electronicas, S.A. (INDELEC)	Venezuela	20
Transformadores de Distribucion Trade, S.A. (TRADESA)	Venezuela	40
Westinghouse Electro Metalurgicas C.A. (WEMCA)	Venezuela	78.82
CMW Sistemas, Ltda. (CMWS)	Brazil	49

Name	*Incorporated In*	*% of Ownership*
CMW Equipamentos, Ltda. (CMWE)	Brazil	49
Eletromar Industria Electrica Brasileira, S.A.	Brazil	7.1
Galileo Argentina, C.I.S.A.	Argentina	17
Galileo Uruguaya, S.A.	Uruguay	91.7
Industry Services Company of Saudi Arabia, Ltd. (ISCOSA)	Saudi Arabia	75
Korea Industry Services Co., Ltd.	Korea	60
Westinghouse, S.A. (WESA)	Spain	51
Iberatomica	Spain	8
Westinghouse Projectos Electricos, S.A. (WEPESA)	Spain	30.3
Westinghouse Asia Controls Corp.	Philippines	66.66
Ercole Marelli & Company, S.p.A.	Italy	4
Elektrik Techizati Imalti Tesisati, A.S.	Turkey	4.23
Hyosung Heavy Industries, Ltd.	Korea	4.5
Westinghouse Electric Supply Company of Saudi Arabia (WESCOSA)	Saudi Arabia	60
IEM S.A.	Mexico	23.7
Industria IEM, S.A. de C.V.	Mexico	91
Mex Control, S.A. de C.V.	Mexico	51
Silectra, S.A. de C.V.	Mexico	60
WEXICO Systems and Services, Ltd.	Saudi Arabia	40
China Industry Services Co., Ltd.	Taiwan	75
Transformadores TPL S.A.	Colombia	42.3
Electro — Fanal S.A.	Brazil	65
Mitsubishi-Westinghouse Electric SGC, Ltd.	Japan	50
Westinghouse E-Mail, Ltd.	Australia	51
Cemac Westinghouse Pty. Ltd.	Australia	50

Name	*Incorporated In*	*% of Ownership*
Contradores Electricos, C.A.	Ecuador	19
Westinghouse Saudi Arabia Ltd. (WSAL)	Saudi Arabia	10
Westinghouse Projectos Electricos, S.A. (WEPESA)	Spain	40
Westinghouse, S.A.	Spain	11.29
Galileo Argentina, C.I.S.A.	Argentina	34
Galileo Uruguaya, S.A.	Uruguay	91.7
IEM S.A.	Mexico	19.59
Mex Control, S.A. de C.V.	Mexico	51
Silectra, S.A. de C.V.	Mexico	60
Industria IEM, S.A. de C.V.	Mexico	91
Mitsubishi Electric Corporation	Japan	3.29

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No. 86-181

In the Supreme Court of the United States

OCTOBER TERM, 1986

PATRICIA A. DIXON, PETITIONER

v.

WESTINGHOUSE ELECTRIC CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

Whether the 300-day charge filing period, made applicable by Section 706(e) of Title VII of the Civil Rights Act of 1964 when the complainant "initially institute[s] proceedings" with a state or local agency, applies where the Equal Employment Opportunity Commission (EEOC) and the state or local agency have entered into a worksharing agreement determining that the EEOC rather than the state or local agency will initially process the complainant's charge.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Discussion	5
Conclusion	15

TABLE OF AUTHORITIES

Cases:

EEOC v. *Ocean City Police Department*, 787 F.2d 955 14
EEOC v. *Shamrock Optical Co.*, 788 F.2d 491 12
Howze v. *Jones & Laughlin Steel Corp.*, 750 F.2d 1208 12
Isaac v. *Harvard University*, 769 F.2d 817 ..... 11, 12
Jones v. *Airco Chemical Co.*, 691 F.2d 1200 12
Love v. *Pullman Co.*, 404 U.S. 522 ..... 2, 6, 11
Mohasco Corp. v. *Silver*, 447 U.S. 807 ..... 2, 5, 6, 7, 9, 10, 11, 12, 14
Oscar Mayer & Co. v. *Evans*, 441 U.S. 750 ..... 2, 7, 9, 10
Smith v. *Oral Roberts Evangelistic Ass'n, Inc.*, 731 F.2d 684 12
University of Tennessee v. *Elliott*, No. 85-588 (July 7, 1986) 2
Thomas v. *Florida Power & Light Co.*, 764 F.2d 768 12

Statutes and regulation:

Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. II) 621 *et seq.* 2
§ 14(b), 29 U.S.C. 633(b) 10, 11
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 1, 3
§ 706(a), 42 U.S.C. 2000e-5(a) 1
§ 706(c), 42 U.S.C. 2000e-5(c) 3, 7, 8, 12, 13
§ 706(e), 42 U.S.C. 2000e-5(e) 2, 6, 7, 8, 9, 10, 11, 12, 13

Statutes and regulation—Continued: Page

§ 706(f)(1), 42 U.S.C. 2000e-5(f)(1) 1
§ 709(b), 42 U.S.C. 2000e-8(b) 2, 3, 13

29 C.F.R. 1601.13(a)(5)(ii)(A) 10

Miscellaneous:

110 Cong. Rec. (1964):

p. 8193 9
pp. 12724-12725 9

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BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

INTEREST OF THE UNITED STATES

The Equal Employment Opportunity Commission (EEOC) is the federal agency primarily responsible for administering federal fair employment statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and both the Attorney General and the EEOC have substantial responsibility for enforcement of Title VII (see 42 U.S.C. 2000e-5(a) and (f)(1)). This case concerns the meaning

of Section 706(e) of Title VII, 42 U.S.C. 2000e-5(e), which provides that a complainant must file charges with EEOC within 180 days of the alleged discrimination, except that a complainant is allowed 300 days if he has "initially instituted proceedings with a State or local agency with authority to grant or seek relief." In particular, the case concerns the relevance to those limitations periods of worksharing agreements entered into by the EEOC, pursuant to Section 709(b), 42 U.S.C. 2000e-8(b), with state and local agencies that are administering their own employment discrimination laws. Hence, this case raises issues that directly and significantly implicate the United States and the EEOC's statutory responsibilities. For this reason, the EEOC participated as amicus curiae in the court of appeals. The strong federal interest in this and related issues also prompted our petition for a writ of certiorari in *Love* v. *Pullman Co.*, 404 U.S. 522 (1972), and our participation as amicus curiae in *University of Tennessee* v. *Elliott*, No. 85-588 (July 7, 1986), *Mohasco Corp.* v. *Silver*, 447 U.S. 807 (1980), and *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979) (Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. (& Supp. II) 621 *et seq.*).

STATEMENT

1. On December 18, 1981, petitioner received notice from respondent, Westinghouse Electric Corporation, that it was terminating her employment (Pet. App. 40). Petitioner had been employed by Westinghouse for approximately ten years (*ibid.*). After unsuccessfully pursuing relief under contractual grievance and arbitration procedures, petitioner filed a charge of unlawful sex discrimination, based on

Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, with the EEOC on August 4, 1982, 230 days after her discharge (Pet. App. 40-41).

Pursuant to a "worksharing agreement" entered into between the EEOC and the State of Maryland Commission on Human Rights (MCHR), the EEOC transmitted a copy of the charge to the MCHR on August 6, 1982 (Pet. App. 41-42).[1] Under the worksharing agreement, MCHR waived its right under Title VII (see 42 U.S.C. 2000e-5(c)) to an initial period of exclusive processing of charges (C.A. App. 83).[2] The waiver includes, with some exceptions,[3]

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[1] The EEOC has entered into worksharing agreements, pursuant to Section 709(b) of Title VII, 42 U.S.C. 2000e-8(b), with approximately 80 of the state and local fair employment agencies that enforce state and local employment discrimination laws. Under these agreements, certain categories of discrimination charges are processed by state and local authorities; with respect to other categories, the state or local agency often waives its right under the statute to initiate review, and the EEOC processes the charge from the outset.

[2] "C.A. App." refers to the joint appendix filed in the court of appeals, which includes, among other items, a copy of the worksharing agreement effective between the EEOC and the MCHR during the relevant time period (C.A. App. 80-87). The agreement appended to the petition for a writ of certiorari (Pet. App. 54-64) is the agreement currently in force, which is substantially similar but not identical to that earlier agreement.

[3] The waiver does not extend to charges originally received by the EEOC if (1) the charges are against certain respondents, as agreed to in writing by the EEOC and MCHR; (2) the charges allege at least one basis of discrimination which is outside the EEOC's jurisdiction; or (3) the charges are filed by the MCHR or one of its commissioners (C.A. App. 82). In addition, under the agreement, the MCHR and the EEOC each retains the right to express an interest in pursuing any specific

charges originally received by the EEOC (C.A. App. 82-83). Accordingly, on August 11, 1982, the MCHR returned the transmittal form to the EEOC, stating that it would not process the charge (Pet. App. 42). The MCHR also informed petitioner that it had terminated its proceedings because the EEOC could better process her charge (*ibid.*). The EEOC subsequently issued petitioner a right to sue letter, without making any final determination on the merits of her charge (*id.* at 43).[4]

2. Petitioner filed this action in the United States District Court for the District of Maryland, for injunctive relief and money damages alleging, inter alia, that Westinghouse had engaged in unlawful sex discrimination in violation of Title VII (Pet. App. 43-44; C.A. App. 1-6). Westinghouse filed motions for summary judgment, which the district court granted, dismissing the Title VII claim on the ground that petitioner's filing of her charge with the EEOC was untimely because it occurred more than 180 days after the date of the alleged unlawful employment practice (the date of her discharge) (Pet. App. 44-45; C.A. App. 305-324). The court ruled that the submission by the EEOC to the MCHR of a transmittal form with a copy of petitioner's charge was not sufficient to trigger the 300-day limitations period for charges "initially instituted" with the MCHR, because, under the worksharing agreement, the MCHR

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charge, even if primary responsibility for its processing is assigned by the agreement to the other agency, and the other agency will "wherever possible" defer to that request (C.A. App. 84).

[4] The EEOC's informal conciliation efforts did, however, lead to reinstatement of petitioner to her former position in January 1983 (Pet. App. 43).

had waived its right to process the charge (C.A. App. 310-318). According to the court, "[t]he transmittal was not undertaken in contemplation of any substantive action being taken by the MCHR" (*id.* at 316 (footnote omitted)).

3. The Fourth Circuit affirmed (Pet. App. 39-53). The court concluded that "[t]he plain and unambiguous meaning of section 706(e) is that * * * [t]he only exception [to the 180 day statute of limitations] is when * * * the charging party has initially instituted proceedings before th[e state or local] agency" and that EEOC's referral in this case did not satisfy that requirement (*id.* at 49). The court acknowledged that EEOC regulations provide that the 300-day limitations period should apply, but ruled that the " 'EEOC's 'interpretation' of the statute cannot supersede the language chosen by Congress' " (*id.* at 50, quoting *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 825 (1980)). Like the district court, the court stressed that under the worksharing agreement "it was never contemplated that the MCHR would play a substantive role in processing the charge" and, consequently, the rationale for the extended limitations period—allowing the complainant additional time to pursue state remedies—was absent (Pet. App. 51-52). The EEOC's transmittal "was for informational purposes only and did not constitute an 'initially instituted' charge within the meaning of [Section 706(e)]" (*id.* at 52).

DISCUSSION

Petitioner contends that the decision of the court of appeals is incorrect, is inconsistent with decisions of this Court and of other courts of appeals, and presents an important issue warranting this Court's review. We agree.

1. The court of appeals' ruling that petitioner was not entitled under Section 706(e) of Title VII to the extended 300-day filing period applicable to charges initially instituted with a state fair employment practice (FEP) agency is flawed in two fundamental respects. The ruling rests on an unreasonably narrow construction of "initially instituted" as used in Section 706(e), and it misapprehends the legal relevance of the terms of worksharing agreements entered into between the EEOC and state and local FEP agencies.

It is not disputed that after receiving petitioner's charge, the EEOC immediately transmitted a copy to the MCHR. This is plainly sufficient to "institute" proceedings with the state agency under Section 706(e). See *Mohasco Corp.* v. *Silver*, 447 U.S. 807, 816-817 (1980) ("state proceedings were instituted by the EEOC when it immediately forwarded his letter to the state agency * * * [and s]ince the EEOC could not proceed until either state proceedings had ended or 60 days had passed, the proceedings were 'initially instituted with a State * * * agency' "); see also *Love* v. *Pullman Co.*, 404 U.S. 522, 525 (1972) ("Nothing in [Title VII] suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself.").

Nor may it be objected that this filing with the EEOC and the MCHR was not made in a timely manner. It is not disputed that petitioner filed her charge with the EEOC almost 230 days after the alleged unlawful employment practice.[5] As this Court

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[5] The court of appeals did not address (Pet. App. 47 n.2) and the petition for a writ of certiorari does not present the issue whether, in the context of Title VII, a charge that is

stated in *Mohasco Corp.* v. *Silver*, 447 U.S. at 814 n.16, a "complainant in a deferral state * * * need only file his charge within 240 days of the alleged discriminatory employment practice in order to insure that his federal rights will be preserved." [6]

The court of appeals' contrary conclusion rests on the worksharing agreement entered into between the MCHR and the EEOC, under which the MCHR waived its right under Section 706(c) of Title VII (see 42 U.S.C. 2000e-5(c)) to exclusive initial processing of certain types of charges. The court of appeals apparently concluded that because the MCHR agreed to have the EEOC initially process certain charges, including most of those originally received by the EEOC, those charges became subject to the 180-day rather than the 300-day filing period of Section 706(e). For this to be true as to this particular charge, the terms of the worksharing agreement either must have rendered the MCHR other than "a State * * * agency with authority to grant or seek relief from [the alleged discriminatory practice]," or must have prevented the EEOC from "initially instituting" a charge with the MCHR on behalf of petitioner. Neither interpretation is remotely plausible.

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untimely under the applicable state statute of limitations may nonetheless commence state proceedings within the meaning of Section 706(c), or alternatively, "initially institute" such proceedings, within the meaning of Section 706(e). See *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750 (1979).

[6] The reference to 240 days instead of 300 days in *Mohasco* reflects the Court's holding in that case that unless the state agency terminates its proceedings earlier, a charge can not be deemed "filed" with the EEOC until 60 days after initiation of the state proceedings. See 447 U.S. at 817. Of course, in this case, the MCHR terminated its proceedings earlier.

The status of the MCHR as a state agency entitled under Title VII to an initial period of exclusive processing of charges filed with the EEOC is not denied by the worksharing agreement—quite the opposite is true. The existence of the worksharing agreement, particularly the inclusion of a waiver of the MCHR's right to exclusive processing of certain charges, confirms the agency's special status under Title VII. It is, moreover, the "authority" of the MCHR under state law, which, under Title VII, is the touchstone for determining its status for the purposes of Section 706(e). See 42 U.S.C. 2000e-5(e) (emphasis added) ("initially instituted proceedings with a State or local agency with *authority* to grant or seek relief"); see also 42 U.S.C. 2000e-5(c) (emphasis added) ("In the case of an alleged unlawful employment practice occurring in a State * * * which has a *State * * * law* prohibiting the unlawful employment practice alleged and *establishing or authorizing a State * * * authority to grant or seek relief* * * *, no charge may be filed * * * before the expiration of sixty days after proceedings have been commenced under the State * * * law, unless such proceedings have been earlier terminated"). The precise manner in which the MCHR chooses to exercise any statutory rights conferred by Title VII, including the waiver of any of those rights in a worksharing agreement, does not alter (let alone negate) the fundamental nature of the MCHR's state law authority.[7]

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[7] The contrary view would suggest that even a complainant who filed initially with a state FEP agency would not be entitled to the 300-day limitations period if the worksharing agreement between the state agency and the EEOC happened to waive the state agency's right to initial exclusive process-

The alternative possible basis for the court of appeals' ruling—that the worksharing agreement prevented the EEOC from "initially instituting" the state proceedings on behalf of petitioner—is equally unpersuasive. Indeed, the circumstances of this case reveal the fallacy of that proposition. In this case, pursuant to the worksharing agreement, the EEOC transmitted a copy of the charge to the MCHR, which in turn formally notified both the EEOC and petitioner that it was terminating its proceedings and that the EEOC would handle the charge. Contrary to the court of appeals' characterization (Pet. App. 52), that exchange was not merely for "informational purposes." Under the worksharing agreement, the MCHR expressly reserved the right to reassert an interest in processing a charge to which the agreement generally waived the MCHR's exclusive rights and generally assigned the EEOC primary responsibility (C.A. App. 84).

In any event, even if the effect of the worksharing agreement were to waive completely the MCHR's right to exclusive initial processing, petitioner would still fall within Section 706(e)'s 300-day filing period. The provision for deferral to state proceedings was inserted in the 1964 Act largely to ensure that the state agencies had "every opportunity to employ their expertise and experience without premature interference by the Federal Government." 110 Cong. Rec. 12724-12725 (1964) (remarks of Sen. Humphrey); see *Mohasco Corp.* v. *Silver*, 447 U.S. at 821; *Oscar Mayer & Co.* v. *Evans*, 441 U.S. at 755; see also 110 Cong. Rec. 8193 (1964) (remarks of Sen. Dirksen). Consistent with that congressional pur-

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ing and assign primary responsibility over his particular charge to the EEOC.

pose, the sole inquiry required by Section 706(e) is whether there is a state FEP agency and whether the EEOC has provided the state agency with "every opportunity" by, for instance, consulting with that agency to determine whether it waives its right of exclusive initial processing or otherwise has terminated its proceedings. See *Mohasco Corp.* v. *Silver*, 447 U.S. at 816-817 ("Since the EEOC could not proceed until either state proceedings had ended or 60 days had passed, the proceedings were 'initially instituted with a State * * * agency' prior to their official institution with the EEOC."). Thus, state agency proceedings have been "initially instituted," within the meaning of Section 706(e), even if immediately upon receipt of a copy of a charge from the EEOC, the state agency notifies the EEOC that it waives its right of exclusive processing and is terminating its proceeding. The existence of a worksharing agreement through which the state agency has, as an administrative matter, decided to notify the EEOC beforehand of its intention in writing should not lead to a different result. See 29 C.F.R. 1601.13(a)(5)(ii)(A).[8]

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[8] Cf. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755 (1979), in which this Court construed Section 14(b) of the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633(b), which "was patterned after and is virtually *in haec verba* with § 706(c) of Title VII" and which is similarly "intended to give state agencies a limited opportunity to resolve problems of employment discrimination" by similarly requiring that state proceedings be "commenced" prior to judicial proceedings. The Court held that the happenstance that the applicable state statute of limitations might bar any state agency proceedings did not mean that those state proceedings were not "commenced" within the meaning of Section

To be sure, the very purpose of a worksharing agreement is to promote efficiency, and thus the existence of such an agreement undercuts one underlying rationale of the 300-day filing period in cases of concurrent jurisdiction. Congress, however, did not decide in Title VII to require worksharing agreements, but instead decided to provide for extended filing periods in Section 706(e), regardless of the manner in which the EEOC and the state agency chose to work together. Section 706(e) cannot have been intended to make the applicable filing period turn on the terms of a worksharing agreement, with which most complainants will be unfamiliar.[9] "[A] court should [not] read in a time limitation provision that Congress has not seen fit to include" (*Mohasco Corp.* v. *Silver*, 447 U.S. at 816 n.19), especially in a "statutory scheme in which laymen, unassisted by trained lawyers, initiate the process" (*Love* v. *Pullman Co.*, 404 U.S. at 527).

2. The Fourth Circuit's ruling is, as petitioner contends (Pet. 23-24), inconsistent with *Isaac* v. *Harvard University*, 769 F.2d 817, 827-828 (1985), in which the First Circuit found timely a charge filed under circumstances akin to those present here. In *Isaac*, the complainant submitted his charge to the

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14(b) of the ADEA, when the EEOC referred a charge to the state agency.

[9] Under the Fourth Circuit's view, a complainant under the jurisdiction of a state FEP agency cannot, contrary to this Court's decision in *Mohasco Corp.* v. *Silver*, 447 U.S. at 814 n.16, safely file a charge with the EEOC on the 240th day. Presumably, only if the state agency chose to exercise its right to make an exception to its general waiver of the exclusive period for charges initially filed with the EEOC (see C.A. App. 84) would the 300-day filing period apply.

EEOC 241 days after the alleged discriminatory practice and EEOC referred the charge to the state agency. On the 263rd day, EEOC received from the state agency a form stating that pursuant to its worksharing agreement with the EEOC, the state "would not process the charge" (769 F.2d at 819). As in this case, the state agency had generally waived its right to exclusive initial processing for charges originally filed with the EEOC (*id.* at 825).

The First Circuit rejected the employer's contention that the state proceedings had not been "terminated" under Section 706(c) by the state's waiver and therefore not timely filed within 300 days under Section 706(e). Although the court did not directly address the issue, the court, by necessary implication, must have determined that the charge had been "initially instituted," within the meaning of Section 706(e), notwithstanding the waiver in the worksharing agreement. Otherwise, there would not have been any state proceedings to "terminate," nor would the 300-day limitations period have been applicable. The First Circuit has thus rejected the reasoning adopted by the Fourth Circuit in this case.[10]

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[10] The Fourth Circuit's ruling in this case also appears to be at odds with *EEOC* v. *Shamrock Optical Co.*, 788 F.2d 491, 493-494 (8th Cir. 1986), *Thomas* v. *Florida Power & Light Co.*, 764 F.2d 768, 771 (11th Cir. 1985), *Howze* v. *Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1211 (3d Cir. 1984), *Smith* v. *Oral Roberts Evangelistic Ass'n, Inc.*, 731 F.2d 684, 687-690 (10th Cir. 1984), and *Jones* v. *Airco Chemical Co.*, 691 F.2d 1200, 1202-1204 (6th Cir. 1982). In each of those cases, the courts of appeals held, consistent with *Mohasco Corp.* v. *Silver, supra*, that the 300-day filing period applied to a charge filed with the EEOC even when the state agency might be barred from acting under the applicable state statute of limitations.

3. Review is also warranted because the question presented by the petition is of exceptional public importance. Pursuant to Section 709(b) of Title VII, the EEOC currently has entered into worksharing agreements with 42 states, the District of Columbia, Puerto Rico, and the Virgin Islands, and approximately 35 municipal agencies. The decision of the court of appeals threatens to undermine the effectiveness of those agreements, render untimely hundreds of pending Title VII charges within the Fourth Circuit,[11] and cast doubt upon thousands of pending and future discrimination charges nationwide.[12] Unless the Fourth Circuit's decision is overturned, in order to avoid misleading claimants to their detriment the EEOC will be compelled to alter its worksharing agreements with state and local FEP agencies, with a concomitant decrease in the efficiency of Title VII administration, contrary to Congress' desire "to encourage the prompt processing of all charges of em-

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[11] Within the Fourth Circuit, the EEOC has worksharing agreements with state agencies in South Carolina, West Virginia, and Maryland, and with local agencies in Virginia, North Carolina, and Maryland. Looking only at Maryland and South Carolina, the EEOC estimates that at least 331 Title VII charges filed between January 1, 1984 and April 1, 1986, would be invalidated by the Fourth Circuit's opinion on timeliness grounds.

[12] Under one interpretation, the Fourth Circuit's decision might even invalidate charges lodged with the EEOC within 180 days. If, as the Fourth Circuit held, filing a charge over which the state waives initial processing cannot "initially institute" state agency proceedings, within the meaning of Section 706(e), it arguably also cannot "commence" state proceedings, within the meaning of Section 706(c), which is necessary to perfect any federal filing. The Fourth Circuit has already suggested the possibility of this extreme result (Pet. App. 53 n.3).

ployment discrimination" (*Mohasco Corp.* v. *Silver*, 447 U.S. at 825 (footnote omitted)).

4. Although we believe that review of the Fourth Circuit's decision is warranted, the Court may wish to postpone its disposition of the petition because the Fourth Circuit has granted rehearing *en banc* in *EEOC* v. *Ocean City Police Department*, 787 F.2d 955 (1986), which offers an opportunity for the court to reconsider the panel ruling in this case. In *Ocean City*, the employer raised the same timeliness challenge raised in this case in the context of an EEOC subpoena enforcement action, and the same panel which decided this case held only that untimeliness of an underlying charge would offer no defense to a subpoena enforcement action. The EEOC supported the petition for rehearing and suggestion for rehearing *en banc* in *Ocean City* and indicated in its submission that to facilitate the court's reconsideration of the timeliness issue, the EEOC would be willing to waive its contention that issues regarding timeliness are not properly litigated in subpoena enforcement actions. It is not clear whether the court of appeals will address the timeliness issue.[13]

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[13] On July 9, 1986, the court of appeals in this case denied a motion by the EEOC, which participated as amicus curiae before the panel, to intervene. The intervention motion tendered a petition for rehearing and suggestion for rehearing *en banc*. In addition, following the grant of rehearing *en banc* in *Ocean City*, the EEOC filed with the Fourth Circuit a motion for clarification of its order, asking specifically whether the court intended to reconsider the panel ruling in this case. The court of appeals acted on the motion by stating that "the Court will consider only such arguments as are pertinent to the disposition of th[e] case" (Order of August 1, 1986). Oral argument in *Ocean City* is scheduled for October 7, 1986.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1986

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(5)

No. 86 - 181

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

PATRICIA A. DIXON,

Petitioner,

vs.

WESTINGHOUSE ELECTRIC CORPORATION,

Respondent.

PETITIONER'S SUPPLEMENTAL AUTHORITY
SUPPLEMENTING THE
PETITION FOR CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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In The
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PETITION FOR CERTIORARI TO THE
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FOR THE FOURTH CIRCUIT

SUPPLEMENTAL AUTHORITY

The schism of authority was widened on October 15, 1986, when the Tenth Circuit Court of Appeals decided Equal Employment Opportunity Commission vs. Commercial Office Procedures, 803 F.2d 581

(1986), Cert. granted June 15, 1987, ___ U.S. ____ 55 U.S.L.W. 3831. The Circuit Court clearly held that the charge, filed with the E.E.O.C. within 289 days after her discharge, which was transmitted to the Colorado Civil Rights Division, was entitled to the three hundred day filing period.

> We have interpreted the Supreme Court decision in Love v. Pullman, 404 U.S. 522, 92 S.Ct. 616, 30 L.Ed.2d 679 (1972), to mean that when a complainant files a charge with EEOC, the deferral of that charge by the EEOC is an intial filing in the state agency sufficient to invoke the 300-day time limitation. Smith v. Oral Roberts Evangelistic Assn., Inc., 731 F.2d 684 (10th Cir.1984). But see Dixon v. Westinghouse Electric Corp., 787 F.2d 943 (4th Cir.1986). As the Supreme Court said in Love: "Nothing in the Act [Title VII of the Civil Rights Act of 1964] suggests that the state proceedings may not be initiated by the EEOC acting on behalf of the complainant rather than by the complainant himself...." 404 U.S. at 525, 92 S.Ct. at 618 (footnote omit-

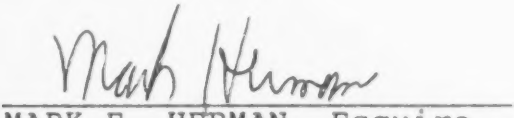
ted). In this case the EEOC initiated the charge with the CCRD on behalf of Leerssen in the charge transmittal form that the EEOC sent to the state agency on March 30, 1984--the 292nd day.[3] Accordingly, Leerssen's charge was "initially instituted" with the CCRD pursuant to the requirements of § 706(e) and the 300-day limitation applies.

Supra., 803 F.2d at 586.

CONCLUSION

This Honorable Court must step in to assure uniform treatment of the claimant's rights.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27 day of August, 1987, three copies of the above Supplemental Authority Supporting the Petition for Certiorari to the United States Court of Appeals for the Fourth Circuit were mailed first class, postage prepaid, to Leonard E. Cohen, Esquire, FRANK BERNSTEIN, CONAWAY & GOLDMAN, 300 East Lombard Street, Baltimore, Maryland 21202, attorney for Respondent; and three copies were mailed first class, postage prepaid to Johnny J. Butler, General Counsel (Acting), EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 2401 East Street, N.W., Room 224, Washington, D.C. 20507.

Mark Herman

MARK F. HERMAN

MOTION FILED
SEP 3 1987

(6)

No. 86-181

In the Supreme Court of the United States

OCTOBER TERM, 1987

PATRICIA A. DIXON, PETITIONER

v.

WESTINGHOUSE ELECTRIC CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM AND SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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9 pp

In the Supreme Court of the United States

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v.

WESTINGHOUSE ELECTRIC CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MOTION FOR LEAVE TO FILE SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

The Solicitor General respectfully moves for leave to file the attached supplemental memorandum on behalf of the United States and the Equal Employment Opportunity Commission (EEOC) as amici curiae.

This case presents the question whether the 300-day charge filing period, made applicable by Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), when the complainant "initially institute[s] proceedings" with a state or local agency,

applies where the EEOC and the state or local agency have entered into a worksharing agreement determining that the EEOC rather than the state or local agency will initially process the complainant's charge. On September 4, 1986, we filed a brief as amici curiae in this case. In that brief, we recommended that the Court grant the petition for a writ of certiorari, but we also suggested that the Court might wish to postpone its disposition of the petition because the Fourth Circuit had recently granted rehearing en banc in *EEOC* v. *Ocean City Police Department*, 787 F.2d 955 (1986), which offered an opportunity for the court of appeals to reconsider the panel ruling in this case.

Two subsequent events bear on that earlier recommendation and need to be brought to this Court's attention prior to its disposition of the petition. First, on June 24, 1987, the Fourth Circuit issued its en banc opinion in *EEOC* v. *Ocean City Police Department*, No. 85-1798.* In that opinion, the court of appeals declined to reconsider its ruling in *Dixon* (see slip op. 5 n.3). Second, on June 15, 1987, this Court granted the EEOC's petition in *EEOC* v. *Commercial Office Products Co.*, No. 86-1696. That case raises a related procedural issue under Title VII and, hence, may bear on the appropriateness of also granting certiorari in *Dixon*. We believe that the Court may wish to have our views on the relevance of these two intervening matters before deciding whether to grant the petition in this case.

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* On July 7, 1987, we lodged a copy of that opinion with the Clerk of the Court.

For the foregoing reasons, we respectfully request that the motion for leave to file the attached supplemental memorandum be granted.

CHARLES FRIED
Solicitor General

CHARLES A. SHANOR
General Counsel
Equal Employment
Opportunity Commission

SEPTEMBER 1987

TABLE OF AUTHORITIES

Cases:	Page
EEOC v. *Commercial Office Products Co.*, cert. granted, No. 86-1696 (June 15, 1987)	3, 4
EEOC v. *Ocean City Police Department*, 787 F.2d 955 (1986), on reh'g en banc, No. 85-1798 (4th Cir. June 24, 1987)	2, 3
Statute:	
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*:	
§ 706(c), 42 U.S.C. 2000e-5(c)	3
§ 706(e), 42 U.S.C. 2000e-5(e)	1

In the Supreme Court of the United States

OCTOBER TERM, 1987

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PATRICIA A. DIXON, PETITIONER

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WESTINGHOUSE ELECTRIC CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

On September 4, 1986, the Solicitor General filed, on behalf of the United States and the Equal Employment Opportunity Commission (EEOC), a brief as amici curiae in this case. This case presents the question whether the 300-day charge filing period, made applicable by Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(e), when the complainant "initially institute[s] proceedings" with a state or local agency, applies where the EEOC and the state or local agency have entered into a worksharing agreement determining that the EEOC rather than the state or local agency will initially process the complainant's charge.

1. In our submission last September, we contended that the decision of the court of appeals is incorrect, is inconsistent with decisions of this Court and of other courts of appeals, and presents an important issue. We accordingly recommended that the Court grant the petition. We also suggested, however, that the Court might wish to postpone its disposition of the petition because the Fourth Circuit had recently granted rehearing en banc in *EEOC* v. *Ocean City Police Department*, 787 F.2d 955 (1986), which offered an opportunity for the court to reconsider the panel ruling in this case.

2. Two subsequent events bear on our earlier recommendation and need to be brought to this Court's attention prior to its disposition of the petition. First, on June 24, 1987, the Fourth Circuit issued its en banc opinion in *EEOC* v. *Ocean City Police Department*, No. 85-1798.[1] In that opinion, the court of appeals declined to reconsider its ruling in *Dixon* (see slip op. 5 n.3). Now that the Fourth Circuit has acted in that case, and left the *Dixon* decision intact, the pending *Ocean City* litigation no longer provides a reason to delay any further disposition of the petition in this case.[2]

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[1] On July 7, 1987, we lodged a copy of that opinion with the Clerk of the Court.

[2] The Solicitor General has recently authorized the filing of a petition for a writ of certiorari in *Ocean City*, which will raise the same timeliness issue already raised by the petition in *Dixon*. The timing of the Court's disposition of the petition in *Dixon*, however, need not be affected by that filing. Should the Court decide to grant review in *Dixon*, the Court should simply hold our petition in *Ocean City* pending the Court's decision in *Dixon*.

A second intervening matter also bears on the appropriateness of further review now in *Dixon*. On June 15, 1987, this Court granted the EEOC's petition for a writ of certiorari in *EEOC* v. *Commercial Office Products Co.*, No. 86-1696, which raises a related procedural issue under Title VII. That case presents the question whether a state agency's decision to defer initial processing of a discrimination charge to the EEOC, pursuant to a worksharing agreement, constitutes a "terminat[ion]" of state "proceedings" within the meaning of Section 706(c) of Title VII, 42 U.S.C. 2000e-5(c), so that the EEOC may immediately deem the charge as filed, rather than being required to wait until sixty days after the commencement of state proceedings. *Dixon* and *Commercial Office Products* raise distinct legal issues, yet they are clearly closely related as a practical matter. Moreover, should this Court reject our view in *Dixon* that the 300-day limitations period is applicable when the worksharing agreement provides for initial processing by the EEOC, the court's opinion would reduce the number of cases turning on the question raised in *Commercial Office Products* whether such a state deferral to the EEOC constitutes a "terminat[ion]" of state "proceedings" under Section 706(c).

If there now appeared to be a reasonable possibility that the Court would address both procedural issues in *Commercial Office Products*, we would recommend that the Court hold the petition in *Dixon* (and the petition soon to be filed in *Ocean City* (see note 2, *supra*)) pending its decision in *Commercial Office Products*. However, the *Dixon* issue of whether the 300-day limitations period is applicable has not been raised in *Commercial Office Products*. Indeed,

the respondent in that case has explicitly disavowed any reliance on the Fourth Circuit's decision in *Dixon*. See 86-1696 Br. in Opp. 9-10 ("Here, completely unlike *Dixon*, the [state fair employment practice agency] clearly indicated that it would take further action on the charge. No argument was ever raised in this case that proceedings were not 'initially instituted' with the [state agency]. Because the facts of this case are so different from the facts in *Dixon*, there is no conflict between the statement here that proceedings were instituted with the state agency and the holding in *Dixon* that they were not."). We cannot therefore reasonably expect that the Court will have the opportunity to address both issues in *Commercial Office Products*. For this reason, we believe it would still be appropriate for the Court to grant the petition in *Dixon*. Due to the close relationship of the two cases, however, the Court might want to schedule the two cases so as to allow for their contemporaneous consideration.

3. It is therefore respectfully submitted that the petition for a writ of certiorari should be granted. Alternatively, the Court may wish to postpone its disposition of the petition pending its decision in *EEOC* v. *Commercial Office Products Co.*, No. 86-1696.

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SEPTEMBER 1987

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